CLERK'S COPY.

[redacted]

[redacted]

Court of the United States

[redacted]

No. [redacted]

[redacted]

[redacted]

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

MARYLAND CASUALTY COMPANY, ET AL.,
PETITIONERS,

vs.

GERTRUDE PICARD CUSHING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Eastern District of Louisiana	1	1
Appearances	1a	2
Complaint	2	3
Motion to consolidate	5	5
Order granting motion to consolidate	8	7
Motions to dismiss and for summary judgment	9	7
Affidavit of Andrew M. Doyle, Jr.	10	9
Certificate of Maryland Casualty Co.	11	9
Note re exhibits	12	10
Affidavit of Newton Padgitt	13	11
Note re exhibits	13	11
Opinion, Wright, J.	14	11
Judgment and order granting motions for summary judgment and to dismiss	22	17
Notice of appeal	23	18
Stipulation of facts	24	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOV. 3, 1952.

—4687

	Original	Print
Record from the United States District Court for the Eastern District of Louisiana—Continued		
Complaint in Case No. 883 Civil Action	28	21
Motion and order transmitting exhibits in their original	36	28
Clerk's certificate (omitted in printing)	38	
Proceedings in the United States Court of Appeals for the Fifth Circuit	39	28
Argument and submission	39	28
Opinion, Strum, J.	40	29
Judgment	48	35
Petition for rehearing	49	35
Opinion on petition for rehearing	62	45
Order denying rehearing	67	48
Clerk's certificate (omitted in printing)	68	
Order allowing certiorari	69	48

BLURRED COPY

[fol. 1]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, BATON ROUGE DIVISION

No. 883, Civil Action

GERTRUDE PICARD CUSHING, Individually, as Administratrix of the succession of TIMOTHY CUSHING, and on behalf of her minor son, TIMOTHY CUSHING, JR.,

vs.

TEXAS & PACIFIC RAILWAY COMPANY, MARYLAND CASUALTY COMPANY, and HOME INSURANCE COMPANY OF NEW YORK

No. 885, Civil Action

LUCILLE E. WELDEN, Individually, as Administratrix of the estate of WILLIAM R. WELDEN, and on behalf of her minor children, MARY L. WELDEN and WILLIAM R. WELDEN, II,

vs.

TEXAS & PACIFIC RAILWAY COMPANY, MARYLAND CASUALTY COMPANY, and HOME INSURANCE COMPANY OF NEW YORK

No. 886, Civil Action

MRS. JEAN D. RANDOLPH, Widow of RUSSELL R. RANDOLPH, Individually, and as Executrix of His Estate,

vs.

TEXAS & PACIFIC RAILWAY COMPANY, MARYLAND CASUALTY COMPANY, and HOME INSURANCE COMPANY OF NEW YORK

No. 887, Civil Action

MRS. MONETTE M. LYNCH, Individually, and as Administratrix of the Succession of HAROLD LYNCH,

vs.

TEXAS & PACIFIC RAILWAY COMPANY, MARYLAND CASUALTY COMPANY, and HOME INSURANCE COMPANY OF NEW YORK

[fol. 1a] No. 888, Civil Action

MRS. A. W. ASHLEY, and MRS. ELIZABETH ASHLEY WORTHEN, Individually, and as Co-Administratrices of the Succession of FLOYD L. ASHLEY,

VS.

TEXAS & PACIFIC RAILWAY COMPANY, MARYLAND CASUALTY COMPANY, and HOME INSURANCE COMPANY OF NEW YORK

APPEARANCES

MESSRS. BROWNE & RAULT, GERARD A. RAULT, ESQ.,
Attorneys for Mrs. Jean D. Randolph
JAMES J. MORRISON, ESQ.,
Attorney for Gertrude Picard Cushing
ARTHUR A. DE LA HOUSSAYE, ESQ.,
Attorney for Lucille E. Welden
RAYMOND H. KIERR, ESQ.,
Attorney for Mrs. Monette M. Lynch and Mrs. A. W. Ashley, et al.
MESSRS. BREAZEALE, SACHSE, WILSON & HERBERT, H. PAYNE BREAZEALE, ESQ.,
Attorneys for Texas & Pacific Railway Company
MESSRS. DEUTSCH, KERRIGAN & STILES, EBERHARD P. DEUTSCH and RENE H. HIMEL, JR., ESQS.,
Attorneys for The Home Insurance Company of New York and Maryland Casualty Company

Appeal from the District Court of the United States for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 20th day of September, 1951, at the City of New Orleans, Louisiana.

Extension of Time granted by the Honorable United States District Court, Eastern District of Louisiana, bringing the return day up to and including November 26th, 1951.

BLURRED COPY

[fol. 2] COMPLAINT—Filed May 18, 1951

To the honorable the judges of the United States District Court, Eastern District of Louisiana, Baton Rouge Division:

1

Plaintiff, Mrs. Jean D. Randolph, widow of Russell R. Randolph and executrix of his estate, is a citizen of the State of Kentucky. Defendants are corporations created under the laws of a state or states other than the states of Kentucky or Louisiana but are authorized to do business and are actually doing business in the Eastern District of Louisiana. The amount in controversy, exclusive of costs and interest, exceeds the sum of $3,000.00. Jurisdiction and right of action against Maryland Casualty Co. and Home Insurance Co. of New York is also based under the provisions of 41 Stat 1007, as amended, popularly known as the Jones Act. (46 U.S.C. 688)

2

Defendant, Texas & Pacific Railway Company, is the owner and operator of a railroad draw bridge which crosses the Atchafalaya River near Melville, Louisiana, which said bridge was struck on May 19, 1950 by the tow boat JANE SMITH and her tow as hereinafter alleged.

3

Defendants, Maryland Casualty Co. and Home Insurance Co. of New York, are the liability insurance under-[fol. 3] writers of the tow boat JANE SMITH and of Charles C. Smith, as owner, and Oil Transport Company, Inc., as charterer, under policies of liability insurance issued and/or delivered in the State of Louisiana, which said policies cover the injury and death which are the subject of this complaint and as such said corporations are liable to this direct action under the provisions of Louisiana Revised Statutes 22:655 et seq.

4

During all the times referred to herein Oil Transport Company, Inc. was the charterer and operator and Charles C. Smith was the owner of the tow boat JANE SMITH used

in the transportation of freight for hire by water in interstate commerce.

5

During the month of May 1950, Russell R. Randolph, husband of plaintiff, was employed as an officer and member of the crew of the tow boat JANE SMITH, and, at all times to referred to herein, was serving aboard said tow boat in that capacity.

6

At about 9:00 P.M., May 19, 1950, the said tow boat JANE SMITH and her tow were proceeding in the Atchafalaya River and were approaching the draw bridge hereinabove referred to owned by defendant corporation, Texas & Pacific Railway Company. At this time petitioner's late [fol. 4] husband, Russell R. Randolph, was off duty and in the galley of said tow boat.

7

At approximately 9:00 P.M., May 19, 1950 or a few minutes thereafter the said JANE SMITH, in attempting to enter the pass through the span of said bridge, collided with a concrete pier of the draw span of said bridge and capsized, trapping and drowning the said Russell R. Randolph.

8

Plaintiff avers that nothing the said Russell R. Randolph did or omitted to do caused or contributed to said accident, but that said accident was caused by the gross negligence of defendant railroad or in the alternative, by the gross negligence of the owner of said tow boat, the assured of defendant insurance companies; or in the alternative, by the negligence of Oil Transport Company, Inc., also the assured of defendant insurance companies; or in the alternative, by the joint negligence of the defendent railroad company and/or the owner of said tow boat, JANE SMITH, and/or the charterer of the tow boat JANE SMITH.

9

Plaintiff avers that she was totally dependent upon her late husband and that by his death she has not only suf-

BLURRED COPY

fered the loss of her financial support, but has been deprived of the loving care, comfort and affection of her said husband, and has endured, because of his death and because [fol. 5] of the delayed finding of his body, great mental pain and suffering, all to her damage in the sum of $150,000.00.

Wherefore, plaintiff demands a trial by jury and judgment against defendant, Texas & Pacific Railway Company, in the sum of $150,000.00 together with interest and costs; or in the alternative judgment against defendant corporations, Maryland Casualty Co. and Home Insurance Co. of New York, in the sum of $150,000.00 together with interest and costs; or in the further alternative against all of the said defendants jointly, severally, and insolido in the full sum of $150,000.00 together with interest and costs.

Browne & Rault, Attorneys for Plaintiff; by (S.) Gerard A. Rault, 1701 American Bank Building, New Orleans, Louisiana.

Serve all defendants through the Secretary of State of Louisiana.

In United States District Court

Motion to Consolidate—Filed June 22, 1951

Defendants Maryland Casualty Company and Home Insurance Company of New York appear herein solely and specially for the purposes of the following motions, without in any way waiving or abandoning, but on the contrary expressly reserving, any and all pleas and defenses of whatever nature which they have or may have to the above captioned action, and particularly without acknowledging [fol. 6] or acquiescing in this court's jurisdiction of said action but expressly reserving their pleas to the jurisdiction.

Suggesting to the court that in re Oil Transport Company Inc., No. 508 in Admiralty, Eastern District of Louisiana, Baton Rouge Division, and in re Charles C. Smith, No. 512 in Admiralty, Eastern District of Louisiana, Baton Rouge Division, consolidated proceedings for limitation of liability,

which concern the events at issue in the above-captioned action, are now pending, and that plaintiff in the above-captioned action has filed claims, based on the alleged cause asserted in the above-captioned action, in said limitation proceedings:

Defendants Maryland Casualty Company and Home Insurance Company of New York move the court, with the annexed affidavits for an order consolidating with the above-captioned action those of Gertrude Picard Cushing vs. Texas & Pacific Railway Company, et al., Civil Action No. 883, Eastern District of Louisiana, Baton Rouge Division; Lucille E. Welden vs. Texas & Pacific Railway Company, et al., Civil Action No. 885, Eastern District of Louisiana, Baton Rouge Division; Mrs. Monette M. Lynch vs. Texas & Pacific Railway Company et al., Civil Action No. 887, Eastern District of Louisiana, Baton Rouge Division; and Mrs. A. W. Ashley et al. vs. Texas & Pacific Railway Company, et al., Civil Action No. 888, Eastern District of Louisiana, Baton Rouge Division, on the ground that all of said actions involve common questions of law and fact and [fol. 7] that consolidation will avoid expense, delay and confusion. Said defendants file herewith a memorandum of authorities in support hereof and of the motions to consolidate filed in said companion actions.

Said defendants further move the court for an order extending their time, within which to file defensive pleadings in the above-captioned action, for a period of twenty days following disposition of the foregoing motion.

(S.) Eberhard P. Deutsch of Deutsch, Kerrigan & Stiles, Attorneys for Maryland Casualty Company and Home Insurance Company of New York.

To: James J. Morrison, Esq., Attorney for Gertrude Picard Cushing; Messrs. Browne & Rault, Attorneys for Mrs. Jean D. Dandolph; Raymond H. Kierr, Esq., Attorney for Mrs. A. W. Ashley, et al., and for Mrs. Monette M. Lynch; Arthur A. Delahoussaye, Esq., Attorney for Lucille E. Welden; Messrs. Breazeale, Sachse, Wilson & Hebert, Attorneys for Texas & Pacific Railway Company.

Please take notice that the foregoing motions will be brought on for hearing before the United States District

BLURRED COPY

Court at the Postoffice Building in New Orleans on Wednesday, June 27, 1951, at ten o'clock A.M.

(S.) Eberhard P. Deutsch.

[fol. 8] I certify that copies of the foregoing motions and notice of the annexexd affidavits, and of the memorandum of authorities filed in support of the motions, have been served on the attorneys to whom the notice is addressed.

(S.) Rene H. Himel, Jr.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING MOTION TO CONSOLIDATE—June 27, 1951

This cause came on this day to be heard on motion of defendants, Maryland Casualty Company and Home Insurance Company of New York to consolidate.

Present: E. Deutsch, Esq., Attorney for Maryland Cas. Co. and Home Ins. Co. of N.Y.; Payne Breazeale, Esq., Attorney for T. & P.; James J. Morrison, Esq., Attorney for Plaintiffs.

There being no objection:

It is ordered that the motion of defendants, Maryland Casualty Company and Home Insurance Company of New York to consolidate be, and the same is hereby, granted. Counsel for defendants are allowed 20 days to file extension of time to plead.

[fol. 9] IN UNITED STATES DISTRICT COURT

MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT—Filed July 10, 1951

Defendants Maryland Casualty Company and Home Insurance Company of New York move the Court, with the annexed supporting affidavits and attached exhibits, to dismiss the within actions as to movers, and for summary judgment in each of said actions, on the grounds that

1. The court lacks jurisdiction of said actions against movers;

2. The complaints in said actions fail to state claims against movers upon which relief can be granted, because

A—Section 655 of Title 22 of the Louisiana Revised Statutes of 1950 does not, and cannot constitutionally, apply to the policies of marine insurance in suit, or to the instant alleged maritime causes;

B—Plaintiffs are seeking to enforce directly against movers in the within actions, claims as against which movers' assureds have initiated in this court, proceedings for exoneration from, or limitation of, liability.

Defendants Maryland Casualty Company and Home Insurance Company of New York further move the court to enter a finding that there is no just cause for delay in the entry of the orders and judgments herewith demanded, and to direct that final judgments be entered in favor of movers, dismissing them from the within actions.

(S.) Eberhard P. Deutsch of Deutsch, Kerrigan & Stiles, Attorneys for Movers.

[fol. 10] To: Messrs. Browne & Rault, Attorneys for Mrs. Jean D. Randolph; James J. Morrison, Esq., Attorney for Gertrude Picard Cushing; Arthur A. de la Houssaye, Esq., Attorney for Lucille E. Welden; Raymond H. Kierr, Esq., Attorney for Mrs. Monette M. Lynch and Mrs. A. W. Ashley, et al.; Messrs. Breazeale, Sachse, Wilson & Hebert, Attorneys for Texas & Pacific Railway Company.

Please take notice that the foregoing motions will be brought on for hearing before the United States District Court at the Post Office Building, New Orleans, on Wednesday, July 18, 1951, at 10:00 o'clock A.M.

(S.) Eberhard P. Deutsch.

Certificate

I certify that copies of the foregoing motions and notice, and of the memorandum of authorities filed in support of the motions, have been served on counsel for plaintiffs and for defendant Texas & Pacific Railway Company.

(S.) Rene H. Himel, Jr.

New Orleans,
July 9, 1951.

BLURRED COPY

AFFIDAVIT OF ANDREW M. DOYLE, JR.—IN SUPPORT OF MOTION
STATE OF LOUISIANA,

Parish of Orleans:

Before me, the undersigned authority, personally ap-
[fol. 11] peared ANDREW M. DOYLE, JR., who, being duly sworn, deposed that:

He is assistant manager of the New Orleans Claim Division of defendant Maryland Casualty Company. Attached hereto is a true copy of said defendant's Standard Workmen's Compensation and Employers' Liability Policy No. 01-493468, issued to Oil Transport Company, Inc., et al., which was the sole insurance policy of said defendant, in effect during May, 1950, covering liability as to members of the crew of the Towboat Jane Smith.

(S.) Andrew M. Doyle, Jr..

Sworn to and subscribed before me this 10th day of July, 1951. (S.) Gerald J. Gallinghouse, Notary Public.

CERTIFICATE OF MARYLAND CASUALTY CO.

Maryland Casualty Company

Be it known that the Maryland Casualty Company a Maryland Corporation with headquarters at Baltimore, Maryland, by its duly qualified officer, does hereby certify, identify and recognize the attached as a true copy of the original policy 01-493468 with endorsements issued by its duly qualified agents to Robert H. Beattie dba Oil Transport Company & Oil Transport Co. Inc., 338 Baronne Street, New Orleans, Louisiana.

Dated at Baltimore, Maryland this 28th day of June, 1951.

(S.) W. K. Lloyd, Vice-President, Maryland Casualty Company.

Attest: (S.) Glenn C. Bramble, Secretary, Maryland Casualty Company.

STATE OF MARYLAND,
City of Baltimore, ss:

This is to certify that on this 28th day of June, 1951 appeared before me W. Kenyon Lloyd and made oath in due form of law that the matters and facts contained herein are [fol. 12] true and correct to the best of his knowledge, information and belief.

Witness my notarial seal and hand this 28th day of June, 1951.

(S.) J. W. Frank, Notary Public.

N.B. The laws of this State do not require a Notarial Seal to be filed in this office.

STATE OF MARYLAND,
Baltimore City, Set.:

I, M. Luther Pittman, Clerk of the Superior Court of Baltimore City, do hereby certify that J. Wm. Frank before whom the annexed acknowledgement and affidavit were made, and who has hereto subscribed his name, was, at the time of so doing, a Notary Public of the State of Maryland, in and for the City of Baltimore, residing in said City and State, duly commissioned and sworn, and authorized by law to administer oaths and take acknowledgements, or Proof of Deeds to be recorded therein. I further certify that I am acquainted with the handwriting of the said Notary, and verily I believe the signature to be his genuine signature.

In testimony whereof, I hereto set my hand and affix the seal of the Superior Court of Baltimore City, the same being a Court of Record, this 28th day of June, 1951.

(S.) M. Luther Pittman, Clerk of the Superior Court of Baltimore City. (Seal.)

NOTE RE EXHIBITS

(Photostatic copies of exhibits attached to foregoing motion to dismiss, transmitted to Court of Appeals in their original form as per order of court copied herein.)

BLURRED COPY

[fol. 13] AFFIDAVIT OF NEWTON PADGITT IN SUPPORT OF MOTION

STATE OF LOUISIANA,
Parish of Orleans:

Before me the undersigned authority, personally appeared, NEWTON PADGITT, who, being duly sworn, deposed that:

He is Marine Manager of the Southern Marine Department of defendant Home Insurance Company of New York. Attached hereto is a true copy of said defendant's sole marine protection and indemnity insurance policy No. H 407739 on the Towboat Jane Smith in effect during May, 1950.

(S.) Newton Padgitt.

Sworn to and subscribed before me this 10th day of July, 1951. (S.) Gerald J. Gallinghouse, Notary Public.

NOTE REEXHIBITS

(Copy of insurance policy attached to foregoing motion to dismiss, transmitted to Court of Appeals in its original form as per order of court copied herein.)

[fol. 14] IN UNITED STATES DISTRICT COURT

OPINION—Filed August 24, 1951

James J. Morrison, Arthur A. de la Houssaye, Browne and Rault, Raymond H. Kierr, Attorneys for Plaintiffs.

Breazeale, Sachse, Wilson and Hebert, Attorneys for Texas and Pacific Railway Company.

Deutsch, Kerrigan and Stiles, Attorneys for Maryland Casualty Company and Home Insurance Company of New York.

WRIGHT, District Judge:

Five suits now consolidated were brought against the liability underwriters of the owner and charterer of the

Towboat Jane Smith as well as against the Texas & Pacific Railway Company to recover damages for the death of seamen employed aboard the vessel. The men were drowned when the towboat capsized and sank in the Atchafalaya River. Plaintiffs' right to bring a direct action against the underwriters of the owner and charterer is predicated on Title 22 §655 of the Louisiana Revised Statutes of 1950.

The underwriters have moved to dismiss and for summary judgment, attaching to the motions copies of their policies in question. The grounds for the motion are fivefold: 1st, The Court has no jurisdiction over actions as to the underwriters because plaintiffs are proceeding under the Jones Act. Since that statute creates no direct action against tortfeasor's underwriters no such action can be [fol. 15] authorized by state statute. 2nd, Section 655 of Title 22 of the Louisiana Revised Statutes of 1950 which authorizes a direct action against a tortfeasor's liability insurer does not apply to policies of marine insurance. 3rd, Section 655 would be unconstitutional if it purported to apply to policies of marine insurance in that it would infringe the exclusive constitutional grant to the federal government of jurisdiction over marine matters. 4th, Movers' assureds, the owner and charterer of the towboat Jane Smith, have initiated limitation of liability proceedings with respect to the accident in suit and the statutory injunction of the Limitation of Liability Act precludes the instant actions. 5th, Since plaintiffs are enjoined in the limitation proceedings from suing movers assureds they are precluded by Section 655 itself from suing.

The plaintiffs on the other hand assert that they are not proceeding primarily under the Jones Act; that federal jurisdiction in this case is based on diversity of citizenship and jurisdictional amount and plaintiffs are proceeding against movers under Section 655 on the contracts of liability insurance which they contend are for the protection of the public as well as the assureds. They contend also that the regulation of insurance companies including marine insurance is a matter specifically reserved to the states by congressional act and this action under Section 655 is in no way affected by the so-called uniformity doctrine in admiralty. They contend further that the right of action as

BLURRED COPY

[fol. 16] to the underwriters is unaffected by the limitation of liability proceeding in that that proceeding protects the owner as distinguished from the insurer and the insurer cannot set up as a defense to this action the owner's defense of limitation.

There are several reasons why this action may not stand as against the underwriters. In disposing of these motions, however, this court will cite but two.

The policies in question are marine protection and indemnity policies protecting the owner and charterer of the towboat Jane Smith against liability for personal injury and accidental death occurring on board the vessel. This type of insurance is described in the Louisiana Insurance Code in Louisiana Revised Statutes of 1950, Title 22, Section 6, Subsection 13(e). Title 22, Section 6 defines and classifies the various types of insurance covered by the code. Liability insurance is defined in Section 6, Subsection 4,[1] whereas marine and transportation (inland marine) insurance is defined in Revised Statutes Section 6, Subsection 13.[2]

[fol. 17] Louisiana Revised Statutes of 1950, Title 22, Section 655,[3] under which this action is brought, is entitled,

---

[1] (4) Liability. Insurance against the liability of the insured for the death, injury or disability of an employee or other person, and insurance against the liability of the insured for damage to or destruction of another person's property.

[2] 13(e) "Marine protection and indemnity insurance," meaning insurance against, or against legal liability of the insured for, loss, damage, or expense incident to ownership, operation, chartering, maintenance, use, repair or construction of any vessel, craft or instrumentality in use in ocean or inland waterways, including liability of the insured for personal injury, illness or death or for loss of or damage to the property of another person.

[3] Sec. 655—No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which

"Liability policy; . . . direct action against insurer" and relates solely to liability insurance as described in Title 22, Section 6, Subsection 4. The policies in suit, however, are policies of marine insurance described in Title 22, Section 6, Subsection 13(e). The legislature when it used the term [fol. 18] "liability insurance" in Section 655 obviously intended to limit the application of that section to liability insurance. If it intended Section 655 to be applicable to marine insurance it would have said so. Plaintiffs argue that the term "liability insurance" used in Section 655 is broader than the definition of liability insurance in Section 6, Subsection 4. That argument, however is unsupported by the basic principles of statutory construction. What purpose would there be in defining the types of insurance cov-

---

may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state.

BLURRED COPY

ered by the code if the very definitions given in the code are to be ignored by the code itself?

There is yet a more fundamental reason why the action brought against the underwriters must be abated. The charterer and owner of the Jane Smith have filed limitation of liability proceedings under Title 46, Section 183, U. S. Code. Plaintiffs have filed their claims in that action covering the very claims here in suit. If this action against the shipowner's underwriters is allowed to proceed, the shipowner may be deprived of his right to indemnification against his underwriters. If these plaintiffs should be paid any part of their claims in the limitation proceeding, then the shipowner under his contracts of insurance has a right to be reimbursed by his underwriters. If the underwriters' exposure on the policies is exhausted in paying the claims in this case, then the shipowner's right against his insurers will avail him nothing.

The effect therefore of allowing these plaintiffs to pro- [fol. 19] ceed directly against the shipowner's insurers would be to force the owner to turn his insurance into the limitation proceeding as part of "the interest of such owner in such vessel".[4] This the owner is not required to do. *City of Norwich*, 118 U. S. 468.

The very purpose of the limitation of liability statute is to encourage the investment of capital in shipping in general and in ships in particular. At the time the limitation of liability statute was first adopted by the Congress of the United States in 1851 there was an essential difference between the limitation of liability statutes of the continental countries and that of England. In the continental countries such as Holland[5] and France,[6] the value of the owner's limitation, whereas in England under the Act of 53 George III it was the value before the accident which had to be accounted for. Consequently under the continental statutes interest after the collision or accident was surrendered in limitation could be achieved simply by surrendering the vessel in the condition in which it was after the accident.

---

[4] Title 46, § 183(a).

[5] Grotius, War and Peace, Book 2, Chapter 11, Sec. 13.

[6] French Ordonnance de la Marine 1681.

The shipowner could then claim his insurance and reim- [fol. 20] burse himself for any losses resulting from the collision and the limitation. The English law on the other hand in effect required the shipowner to account in the limitation proceeding for his insurance money.

Congress in passing Revised Statute 4283,[7] our first limitation of liability statute, adopted the continental view. *Norwich Company* v. *Wright*, 80 U. S. 104. Consequently the value of the interest to be surrendered in limitation under our law is the value after the collision, and the shipowner is then free to claim the insurance money as his own. *City of Norwich*, supra. It is true that in the City of Norwich the Supreme Court had before it for decision only the question of the accountability in limitation proceedings for the owner's hull insurance. However, it is clear from the reasoning in the City of Norwich that no real distinction can be drawn in this connection between hull and marine protection and indemnity insurance. The purpose of our limitation statute as distinguished from that of England was and is to provide a shipowner with a method not only of limiting his liability but also of protecting himself against loss by providing himself with insurance. Thus not only is capital encouraged to come into the merchant marine but a method is provided by which that capital may be replenished after losses resulting from the perils of the sea.

[fol. 21] From the above it is obvious that the Congress of the United States under its constitutional perogative to provide laws affecting admiralty and maritime jurisdiction has occupied the field of limitation of liability including contracts of insurance as they relate to the same. *Lindgren* v. *United States*, 281 U.S. 38. To give effect to the direct action statute of Louisiana by allowing these plaintiffs to proceed directly against the shipowner's insurers would not only work material prejudice to the characteristic features of the general maritime law but would also contravene the essential purpose expressed by an Act of Congress in a field already covered by that Act. Title 46 § 183 U.S.C.A.

In view of the foregoing the motions for summary judgment are granted and each of these proceedings is dismissed

---

[7] Now Title 46, § 183 U. S. Code.

BLURRED COPY

as to Maryland Casualty Company and Home Insurance Company of New York.

Since there is no just reason for delay let judgment be entered herein in accordance with Rule 54(b) Federal Rules of Civil Procedure.

New Orleans, Louisiana, August 24th, 1951.

(S.) J. Skelly Wright
United States District Judge.

[fol. 22] IN UNITED STATES DISTRICT COURT

JUDGMENT AND ORDER GRANTING SAID MOTIONS FOR SUMMARY JUDGMENT AND DISMISSING THE CONSOLIDATED SUITS AS TO APPELLEES—Filed August 24, 1951

The captioned consolidated causes came on for hearing on August 1, 1951, on motion of defendants Maryland Casualty Company and Home Insurance Company of New York to dismiss, and for summary judgment.

Present: Messrs. Browne & Rault, Gerard A. Rault, Esq., Attorneys for Mrs. Jean D. Randolph; James J. Morrison, Esq., Attorney for Gertrude Picard Cushing; Arthur A. de la Houssaye, Esq., Attorney for Lucille E. Welden; Raymond H. Kierr, Esq., Attorney for Mrs. Monette M. Lynch and Mrs. A. W. Ashley, et al.; Messrs. Breazeale, Sachse, Wilson & Hebert, H. Payne Breazeale, Esq., Attorneys for Texas & Pacific Railway Company; Messrs. Deutsch, Kerrigan & Stiles, Eberhard P. Deutsch and Rene H. Himel, Jr., Esqs., Attorneys for The Home Insurance Company of New York and Maryland Casualty Company.

And said motions having been argued by counsel and the cases submitted, and the court having taken time to consider, now, for the reasons this day assigned in writing:

It is ordered, adjudged and decreed that the within actions be dismissed as to defendants Maryland Casualty Com- [fol. 23] pany and Home Insurance Company of New York, and that said defendants recover their costs.

It is expressly determined that there is no just reason for delay in the entry of the foregoing final judgment, and it is

accordingly directed that said final judgment be entered forthwith.

8/24/51 J.S.W.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed September 20, 1951

Please take notice that Gertrude Picard Cushing, individually, and as Administratrix of the Succession of Timothy Cushing, and on behalf of her minor son, Timothy Cushing, Jr., Lucille E. Welden, individually, as Administratrix of the Estate of William R. Welden, and on behalf of her minor children, Mary L. Welden and William R. Welden, II, Mrs. Jean D. Randolph, widow of Russell R. Randolph, individually, and as executrix of his estate, Mrs. Monette M. Lynch, individually, and as Administratrix of the Succession of Harold Lynch, Mrs. A. W. Ashley, and Mrs. Elizabeth Ashley Worthen, individually, and as Co-Administratrices of the Succession of Floyd L. Ashley, plaintiffs in the above entitled cause, hereby appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the final judgment of this Court granting the motions for summary judgment by, and dismissing this proceedings [fol. 24] as to, Maryland Casualty Company and Home Insurance Company of New York, entered August 24, 1951.

(S.) James J. Morrison, 327 Hibernia Building, New Orleans, Louisiana, Attorney for Gertrude Picard Cushing, Plaintiff.

(S.) R. H. Kierr, Attorney for Mrs. Monette M. Lynch and Mrs. A. W. Ashley, et al., National Bank of Commerce Bldg., New Orleans, La.

(S.) Arthur A. de la Houssaye, Attorney for Lucille E. Welden, Richards Building, New Orleans, La.

(S.) Gerard A. Rault, Browne & Rault, Attorneys for Mrs. Jean D. Randolph, American Bank Building, New Orleans, La.

To: A. Dallam O'Brien, Jr., Esq., Clerk, United States District Court, Post Office Building, New Orleans, Louisiana; Deutsch, Kerrigan & Stiles, Esqs., 1700 Hibernia Bank Bldg., New Orleans, Louisiana, Attorneys for Appellees.

BLURRED COPY

In United States District Court

Stipulation of Facts—Filed October 25, 1951

It is stipulated by and between appellants and appellees, through their respective undersigned counsel, that:

[fol. 25]

First

Charles C. Smith and Oil Transport Company, Inc., whose underwriters are the appellees herein, and who, at the time of the accident in which appellants' decedents were drowned, were the owner and bareboat charterer, respectively, of the Towboat Jane Smith, had, prior to institution of the captioned consolidated suits, each filed, in the District Court of the United States for the Eastern District of Louisiana, Baton Rouge Division, a proceeding for exoneration from, or limitation of, liability with respect to said accident. Said proceedings, entitled In re Charles C. Smith and In re Oil Transport Company, Inc., respectively, and numbered 512 and 508 respectively in admiralty, had been consolidated prior to institution of the captioned consolidated suits, and are presently pending. Prior to institution of the captioned consolidated suits, injunctions in the usual form had issued in both of said limitation proceedings, prohibiting the institution of suits against the petitioners in said proceedings, based on claims arising out of the aforesaid accident. Said injunctions are still in force.

Second

Prior to institution of any of the captioned consolidated suits, each appellant in said suits had filed, in both of the limitation proceedings described in the First article hereof, defensive pleadings and claims for damages resulting from the deaths of their decedents in the accident with respect [fol. 26] to which both said limitation proceedings and the captioned consolidated suits were brought.

Third

The captioned suits, all of which are on appeal to the United States Court of Appeals for the Fifth Circuit, were consolidated for trial in the district court. All of the plead-

ings, motions and exhibits in each case are substantially the same as the pleadings, motions and exhibits filed in each of the other cases, except as to names of parties and decedents, and the amounts for which suit was brought. In order to shorten the record on appeal, it is stipulated that only the complete pleadings in Civil Action No. 886 (Mrs. Jean D. Randolph, etc. vs. Texas & Pacific Railway Company, et al.) and the complaint in Civil Action No. 883 (Gertrude Picard Cushing, etc. vs. Texas & Pacific Railway Company, et al.) shall be included in the record on appeal in the captioned consolidated suits, in lieu of the entire record in each case, such pleadings to stand as the prototype of all pleadings in all of said cases; and the decision of the Court of Appeals shall determine and govern each of said consolidated cases.

Fourth

The record on appeal in the captioned consolidated suits shall include only:

1—The record in Civil Action No. 886 (Mrs. Jean D. Randolph, etc. vs. Texas & Pacific Railway Company, [fol. 27] et al.) as follows:

A—Complaint;

B—Motion to consolidate filed by appellees;

C—Order consolidating cases, entered on June 29, 1951;

D—Motions to dismiss and for summary judgment (together with annexed affidavits and exhibits) filed by appellees;

E—Opinion, judgment and order granting said motions for summary judgment and dismissing the captioned consolidated suits as to appellees, rendered on August 24, 1951, and entered on August 27, 1951.

F—Notice of appeal.

2—The complaint in Civil Action No. 883 (Gertrude Picard Cushing, etc. vs. Texas & Pacific Railway Company, et al.).

3—This stipulation.

(S.) James J. Morrison, Attorney for Gertrude Pichard Cushing, Appellant.

BLURRED COPY

(S.) Raymond H. Kierr, Attorney for Mrs. Monette M. Lynch and Mrs. A. W. Ashley, et al., Appellants.
(S.) Arthur A. de la Houssaye, Attorney for Lucille E. Welden, Appellant.
(S.) Gerard A. Rault, Attorney for Mrs. Jean D. Randolph, Appellant.
[fol. 28] (S.) Eberhard P. Deutsch of Deutsch, Kerrigan & Stiles, Attorneys for Home Insurance Company of New York and Maryland Casualty Company, Appellees.

New Orleans,
October 18, 1951.

IN UNITED STATES DISTRICT COURT

COMPLAINT IN CASE NO. 883 CIVIL ACTION—Filed May 18, 1951

To the honorable the judges of the United States District Court, Eastern District of Louisiana, Baton Rouge Division:

The Complaint of the Succession of Timothy Cushing, Timothy Cushing, Jr., and Gertrude Picard Cushing, individually, as Administratrix of the Succession of Timothy Cushing, and on behalf of her minor son Timothy Cushing, Jr., of the full age of majority and a resident of the State of Louisiana, with respect represents that:

I

Complainant and her son, minor child of her marriage with Timothy Cushing, deceased, are both residents of Louisiana and the Succession of Timothy Cushing, her husband, has been opened at the court of his domicile, the 24th Judicial District Court, Parish of Jefferson, Louisiana, under Docket No. 34,217, wherein she was appointed administratrix; while each of the defendants is a foreign corporation organized under the laws of a State other than Louisiana, authorized to do and doing business in the Eastern Dis-[fol. 29] trict of the State of Louisiana. The amount in controversy exceeds $3,000.00, exclusive of interest and

costs. Furthermore, so far as defendants Maryland Casualty Co. and Home Insurance Co. of New York are concerned, plaintiff claims the benefit of the provisions of the Jones Act, 41 Stat. 1007, as amended.

II

Oil Transport Company, Inc., charterer of, and Charles C. Smith, owner of, the Towboat Jane Smith, named in this complaint, are not made parties to this action because plaintiff is enjoined from proceeding against them except in Limitation of Liability Proceedings filed under Docket Numbers 508 and 512 of this Honorable Court, wherein the said owners and operators of the said vessel seeks exoneration from all liability, or in the alternative to limit their liability under the Admiralty Law to the value of the wrecked and sunken Towboat Jane Smith at the bottom of the Atchafalaya River, which they allege has no value.

III

Defendants Maryland Casualty Company and Home Insurance Co. of New York are the liability insurance underwriters of the Towboat Jane Smith, of Charles C. Smith, and of Oil Transport Inc., under policies of liability insurance issued and/or delivered in the State of Louisiana, with respect to the injuries, damage and loss which are the subject of this complaint, and as such are liable to this [fol. 30] direct action under La. R. S. 22: 655.

IV

During all material times Charles C. Smith was the owner, and Oil Transport Company, Inc., was the charterer and operator, of the Towboat Jane Smith, and used it in the transportation of freight for hire by water in interstate commerce.

V

During May of 1950, Timothy Cushing, age 41 years, a First Engineer, was employed by Oil Transport Company, Inc., as deckhand on the Towboat Jane Smith on a voyage towing two empty barges from Follansbee, West Virginia, to Drestrehan, Louisiana. Enroute the voyage was changed

BLURRED COPY

to Lake Charles, La., via the Atchafalaya River. The wage stipulated for was $87.50 every two weeks, plus found, which is equal to $200.00 every two weeks as a shore worker.

VI

At about 9:00 P.M., May 19, 1950, the Towboat Jane Smith and tow, being navigated by her Master, arrived at the Texas and Pacific Railroad Bridge over the Atchafalaya River at Melville, La., which bridge is owned and operated by defendant Railroad, and signaled for the draw to open. At this time Timothy Cushing was off duty and on information and belief asleep in his cabin.

VII

Plaintiff avers on information and belief that in attempt- [fol. 31] ing to pass through the span of said bridge the bridgetender delayed opening the drawspan of said bridge, forcing the Jane Smith to make several unsuccessful attempts at the draw before it was opened and the Jane Smith and her tow finally were forced against the concrete pier of the drawspan and into the superstructure of the fixed span of the bridge, wherefore the Jane Smith was capsized and Timothy Cushing trapped in his berth and drowned.

VIII

Plaintiff avers that nothing Timothy Cushing did, or omitted to do, caused or contributed to said accident, but, on information and belief, that said accident was caused or contributed to solely by the negligence of defendant Railroad, or in the alternative by the negligence of defendant insurance companies' assureds, or in the further alternative, by their joint negligence, in the following particulars, among others, that will be shown at the trial hereof:

1. The Railroad's bridge tender was negligent and inattentive to duty.

2. The Railroad's bridge tender failed, neglected and refused to raise the draw on proper signal and approach of the vessel.

3. The Railroad's bridge tender unreasonably and negligently obstructed the fairway of the river by re-

fusing and neglecting to raise the draw on proper signal and approach of the vessel.

4. The Railroad's bridge tender unreasonably delayed the tow's passage through the span for so long a time that said tow got out of alignment, and when [fol. 32] the bridge finally opened the tug and tow were unable to negotiate the span.

5. The bridge was improperly and unsafely constructed and failed to provide fenders or other protective works.

6. The Jane Smith was unseaworthy.

7. The tug and tow were unseaworthy.

8. The tug and tow were in charge of an incompetent and inexperienced master.

9. The tug and tow did not have an experienced pilot aboard.

10. Those in charge of the Jane Smith failed to keep a proper lookout.

11. Those in charge of the Jane Smith were negligent and inattentive to duty, particularly in attempting to pass through the draw without being properly aligned.

12. No warning or alarm was sounded to give Timothy Cushing a chance to escape, as he would have had an alarm been sounded when the danger of collision first became apparent.

13. That the decedent's death was caused by the negligent manner in which the Towboat "Jane Smith" was maintained, operated, and controlled, and by its unseaworthiness, all of which, and the following, were with the knowledge and privity of its owners, operators, and Master, and further resulted by the negligent failure of said parties and their employees to perform their following duties: to provide decedent with a seaworthy vessel and barges and to keep the same in safe condition; to furnish him with ample, proper, and reasonably safe and seaworthy tools, tackle, appliances, gear, equipment, safeguards and working conditions, and to keep the same in a proper state of repair and in safe condition; to furnish decedent with a sufficient number of competent co-employees, superior officers, pilots and crew: to provide for

BLURRED COPY

the safe and proper navigation and operation of said vessel and tow; to promulgate and enforce proper rules for the safe conduct of the operation, of, and work on, said towboat and tow, including decedent's duties [fol. 33] thereon, and to warn decedent and others of the dangers arising and to be encountered therein, and to protect decedent from said dangers; including but not limited to the following specific acts of negligence.

(a) A competent pilot of the Atchafalaya River was not aboard, and the vessel was insufficiently manned for proper navigation and operation;

(b) The vessel was top-heavy and unstable;

(c) The vessel lacked adequate freeboard and was not properly equipped with water-tight doors and bulkheads;

(d) Machinery was exposed to flooding and lacked emergency safeguards;

(e) Proper notices were not issued or posted, directing that water-tight bulkhead doors and other doors and parts be closed;

(f) Vessel was unseaworthy due to faulty trim, load, and design;

(g) The towing cables, lines, ratchets, and equipment were defective and unsafe, and the tow was improperly made up;

(h) The stearing apparatus and rudders of the vessel were defective and unsafe and the said towboat did not respond properly thereto;

(i) The engine of the vessel was inadequate and unseaworthy so that the said towboat was unable to properly control her tow;

(j) One of the vessel's search-lights were broken and rendered unsafe the night operation required by the owners and operators;

(k) No alert, alarm, or warning signal was given, and the devices therefor, and the lifesaving equipment were defective and inadequate;

[fol. 34] (l) The vessel's machinery, tackle, equipment, and gear were deteriorated, inadequate, unseaworthy, and in a state of disrepair; and

(m) The Master of wheelsman was required to perform manifold duties beyond the capacity of one person, which, together with the foregoing, caused or contributed to the lack of sufficient headway of the tow through the water and lack of ample maneuvering distance at the time of and prior to the casualty.

IX

Plaintiff avers that both defendant railroad and the owners and operators of the tug Jane Smith and tow, and the Master and Officers thereof, of whom the other defendants are insurers, fully knew or should have known of the exceptionally dangerous, treacherous and hazardous nature of the passage through the draw at the Melville Railroad Bridge over the Atchafalaya River, and of the extremely strong, swift and irregular currents and cross-currents expected, to be met at and near said bridge, and of the difficulties of negotiating said draw and the dangerous nature thereof; that in view thereof it was the particular duty of the bridge tender of said bridge promptly either to raise said span on the approach of a vessel, or to signal a delay; that in the instant case said bridgetender did neither, but, by neglecting to open the span and giving no signal forced and required said Jane Smith to negotiate and renegotiate such dangerous waters—to approach, back away, reapproach, back away again, and again reapproach said span all the while maneuvering against said treacherous [fol. 35] currents, eddies and cross-currents and confusing and confounding the Master and Officers of said vessel and keeping them in extremis and at tension as to whether the bridge would, or would not open, and whether the vessel should come ahead or reverse, and whether she was properly aligned for the passage or not; and similarly, it was the duty of the Master and Officers of the Jane Smith to exercise particular care and caution in manoeuvering through said span; that under all of the circumstances above set forth, the death of Timothy Cushing, aforesaid, was caused by the joint fault and negligence of the defendants railroad's bridgetender in failing and neglecting promptly to open said span when he could have done so on the approach of said vessel, and thus placing the Master thereof

in extremis and indecision in manoeuvering her; and the joint fault and negligence of the Master and Officers of the Jane Smith in failing properly and carefully align and manoeuvers the vessel and tow through said draw.

X

Plaintiffs aver that the body of Timothy Cushing has never been recovered, that they, and he, have been denied the solace of a decent burial for him; that plaintiff Timothy Cushing, Jr. is an infant of tender years and has thus been deprived of the loving care, comfort, support and training of his father; that plaintiff Gertrude Picard Cushing, individually, has been deprived of the love, affection, comfort [fol. 36] and support of her husband, the father of her child, and the only source of the support and maintenance of herself and family; that by reason of the matters and things aforesaid plaintiffs have suffered damages as follows:

Damages due Timothy Cushing and His Succession for personal injuries and death	$150,000.00
Damages to deponent by reason of the death of Timothy Cushing	150,000.00
Damages to Timothy Cushing, Jr., by reason of the death of Timothy Cushing	150,000.00
Total	$450,000.00

XI

Plaintiffs demand a jury trial.

Wherefore, plaintiffs demand a jury trial, and judgment against defendants jointly, severally and in solido in the sum of $450,000.00, plus interest and costs.

(S.) James J. Morrison, Attorney for Plaintiff, #327 Hibernia Bank Building, New Orleans, Louisiana.

IN UNITED STATES DISTRICT COURT

MOTION AND ORDER TRANSMITTING EXHIBITS IN THEIR ORIGINAL—Filed: November 7, 1951

On motion of James J. Morrison and on suggesting to the Court that the originals of the exhibits filed in this matter should be included as a part of the record on appeal in lieu of copies thereof.

[fol. 37] It is ordered that the originals of the Exhibits filed in this matter should be included as a part of the record on appeal in lieu of copies thereof.

November 7th, 1951

(S.) J. Skelly Wright,
Judge.

(S.) James J. Morrison, Attorney for Appellants, 1014 Pere Marquette Bldg., New Orleans, La.

[fol. 38] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 39] IN UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GERTRUDE PICARD CUSHING, ETC., ET AL.,

versus

MARYLAND CASUALTY COMPANY, ET AL.,

No. 13887

ARGUMENT AND SUBMISSION—April 23, 1952

On this day this cause was called, and after argument by James J. Morrison, Esq., for appellants, and Eberhardt P. Deutsch, Esq., for appellees, was submitted to the Court.

BLURRED COPY

[fol. 40] IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 13887

GERTRUDE PICARD CUSHING, ETC., ET AL., Appellants,

versus

MARYLAND CASUALTY COMPANY, ET AL., Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

OPINION OF THE COURT—Filed July 31, 1952

Before HOLMES, STRUM, and RIVES, Circuit Judges.

STRUM, Circuit Judge: This appeal is from a summary judgment dismissing, as to the insurers involved, five consolidated actions at law brought to recover damages for the death of five seamen who drowned when the tug boat "Jane Smith" collided with a bridge, capsized and sank in navigable waters within the admiralty jurisdiction in Louisiana. Federal jurisdiction is asserted both under [fol. 41] Sec. 33 of the Merchant Marine (Jones) Act of 1920, 46 U. S. C. A. 688, and upon diversity of citizenship.

The suits are against Texas & Pacific Railway Company, owner of the bridge, and Maryland Casualty Company and Home Insurance Company, who are the liability insurance underwriters of the owner and charterer of the tug, insuring against loss of life by, or personal injury to, the crew of said vessel. The complaints allege that the deaths were due to the negligence of the bridge owner, and of the owner and charterer of the tug.

Plaintiffs assert the right to directly sue the insurers under Louisiana's "direct action" statute, Title 22, Sec. 655, La. Rev. Stat. 1950, which provides in part: "The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy, * * * and said action may be brought against the insurer alone or against both the insured and the insurer, jointly * * *." The policies involved were issued and delivered in Louisiana.

The dominant question is whether or not the statute applies to policies which protect the owner and charterer of a vessel against liability for personal injuries or accidental death suffered by the crew of a vessel in navigable waters. The district judge answered the question negatively. He was of the view that Sec. 655, *supra*, which relates to "liability" insurance, is confined to the ordinary type of liability insurance as defined in Title 22, Sec. 6(4), La. Rev. Stat. 1950, and does not extend to "marine protection and in- [fol. 42] demnity insurance," as defined in Sec. 13(e) of that title, which is the type of policy here sued upon. He was further of the view that to give effect to the direct action statute as to these policies would be an invasion of the field of exclusive federal jurisdiction over admiralty and maritime matters which would not only impair the characteristic features of general maritime law, but would contravene the essental purpose of limitation of liability procedings in admiralty, under 46 U. S. C. A. 183, which have been instituted by this owner and charterer, and in which these plaintiffs have filed claims. As one of the policies also provides hull insurance, the district judge was further of the view that to the extent of plaintiffs' recovery in the limitation proceedings, the owner would be compelled to surrender insurance money to the claimants therein, contrary to the rule established in *Norwich v. Wright*, 80 U. S. (13 Wall.) 104, 20 L. Ed. 585, and in *City of Norwich*, 118 U. S. 468, 30 L. Ed. 134, that an owner's liability is confined to the value of the vessel after the damage, not before, and that insurance money belongs to the owner, not to the claimants.[1]

Note (1): The district judge said: "If these plaintiffs should be paid any part of their claims in the limitation proceedings, then the shipowner under his contracts of insurance has a right to be reimbursed by his underwriters. If the underwriters' exposure on the policies is exhausted in paying the claims in this case, then the shipowner's right against his insurers will avail him nothing.

"The effect therefore of allowing these plaintiffs to proceed directly against the shipowner's insurers would be

BLURRED COPY

It appears to us that in enacting Sec. 655, *supra*, the Louisiana legislature used the term "liability insurance," in its broad generic sense, meaning that form of insurance by which an insured is indemnified against liability on account of bodily injuries sustained by others. The statute [fol. 43] is not limited to the one type of liability insurance defined in Sec. 6(4), Title 22, *supra*, but extends as well to marine liability insurance of the type here involved. The statute is remedial.[2] It should be liberally construed to accomplish its obvious purpose, which is to afford an injured person a direct action against a compensated insurer who has assumed ultimate liability. There is no indication in Sec. 655 that the Louisiana legislature intended to deny the right of direct action to persons covered by marine policies, while extending it to all others. On the contrary, it appears to us that it was intended, so far as the state legislative powers are effective, to extend the right to all persons covered by what is broadly known as "liability insurance," including policies of the type here in question. While the policies sued on cover marine activities, fundamentally they are ordinary contracts of indemnity insurance.

Title 28 U. S. C. A. 1333, a part of the original Judiciary Act of 1789, provides that United States district courts shall have original jurisdiction, exclusive of the courts of the states, of any civil case of admiralty or maritime jurisdiction, "saving to suitors in all cases all other remedies to which they are otherwise entitled." Applying this clause in upholding the validity of the New York Arbitration statute as applied to a dispute under a charter party made and to be performed in that state, the United States Supreme Court said: "The 'right of a common law remedy,' so saved to suitors, does not * * * include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceed-

---

to force the owner to turn his insurance into the limitation proceeding as part of 'the interest of such owner in such vessel.' This the owner is not required to do. City of Norwich, 118 U. S. 468, 30 L. Ed. 134."

Note (2): Gager v. Teche Transf. Co., 143 So. 62; Hudson v. Georgia Cas. Co., 57 Fed. (2) 757.

[fol. 44] ings in admiralty which may be employed to enforce the right or to redress the injury involved. * * * A State may not provide a remedy *in rem* for any cause of action, within the admiralty jurisdiction. * * But otherwise, the State, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit. * * * In no case has this Court held void a state statute which neither modified the substantive maritime law, nor dealt with the remedies enforceable in admiralty." *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 123, 68 L. Ed. 582, 586. These principles are determinative here.[3]

While Sec. 655, *supra*, confers upon an injured party a substantive right which becomes vested at the moment of the injury,[4] it is not a right essentially maritime in character, nor one peculiar to admiralty or maritime jurisdiction, but is one which applies alike to all contracts of public liability insurance, regardless of whether the in-

---

Note (3): See also Western Fuel Co. v. Garcia, 257 U. S. 233, 66 L. Ed. 210, and Great Lakes D&D Co. v. Kierejewski, 261 U. S. 479, 67 L. Ed. 756, holding that although admiralty affords no relief for wrongful death under general maritime law, an action *in personam* may be maintained in admiralty under a state "wrongful death" statute to recover for a death upon navigable waters as a result of a maritime tort. (Statutory remedies for personal injuries or death suffered by a seaman, or for wrongful death on the high seas, are now provided by 46 U. S. C. A. 688, 761). Also, see Jarka Corp. v. Hellenic Lines (CA-2) 182 Fed. (2) 916, 919, holding general New York law applicable to a stevedoring contract, which is a maritime contract. What was said as to "uniformity" in So. Pac. Co. v. Jensen, 244 U. S. 205, 61 L. Ed. 1086, has been sharply limited by Standard Dredging Corp. v. Murphy, 319 U. S. 306, 87 L. d. 1416.

Note (4): Fisher v. Home Indemnity Co. (CA-5), decided June 30, 1952, ... Fed. (2) . . . . ; New Amsterdam Cas. Co. v. Soileau (CA-5) 167 Fed. (2) 767; Belanger v. Great American Indemn. Co. (DC-La.), 89 Fed. Supp. 736; West v. Monroe Bakery, Inc. (La.) 46 So. (2) 122.

BLURRED COPY

jury occurs ashore or afloat. There is nothing in it which undertakes to change the substantive admiralty law, nor does it undertake to deal with a remedy in courts of ad- [fol. 45] miralty. The statute provides only an additional and cumulative remedy at law in the enforcement of obligations of indemnity voluntarily and lawfully assumed by the insurer. Thus the statute does not conflict with any feature of substantive admiralty law, nor with any remedy peculiar to admiralty jurisdiction. These suits are at law, not in admiralty.

Appellees, the insurers, further contend that the Jones Act, 46 U. S. C. A. 688, creates a right of action against an injured seaman's employer, but not against the employer's liability underwriter, and that the State of Louisiana can not add to the rights created by the Jones Act. It is unnecessary, however, to determine that question. Even if there were no jurisdiction, nor any right of action, under the Jones Act, which we do not decide, diversity of citizenship exists between all plaintiffs and the defendant insurers, and more than $3,000.00 is involved in each suit. These circumstances support federal jurisdiction. The complaints contain averments which sufficiently assert liability upon general principles of negligence, and also for accidental death within the coverage of the policies sued upon, so that a cause of action is stated.

Appellees' contentions over-inflate a relatively simple proposition with apparent, but unreal, technical problems. Stripped of illusory technicalities, the Louisiana statute merely creates in favor of one who has been wrongfully injured, an additional and cumulative remedy *at law* against an insurer who has agreed to indemnify the *tort feasor* against liability, by subrogating the injured person [fol. 46] to all the rights of the insured within the terms and limits of the policy. Other existing remedies are not in the least impaired or affected. *New Amsterdam Cas. Co. v. Soileau* (CA-5) 167 Fed. (2) 767. Such contracts of insurance are for the benefit of the public, as well as of the insured employer. *Davies v. Consolidated Underwriters*, 6 So. (2) 351; *West v. Monroe Bakery, Inc.*, 46 So. (2) 122. The statute is simply a regulation by the state of insurance companies doing business within its boundaries, for

which there is ample sanction in federal law. 15 U. S. C. A., 1011, 1012, the McCarran Act.[5] The limitation of liability statutes, 46 U. S. C. A. 183, *et seq.*, relate, not "to the business of insurance" as mentioned in the McCarran Act, but to the liability of shipowners. The object of that proceeding is to limit the liability of the owner, not to preclude injured persons from pursuing any remedy open to them against others. To permit such an action will not defeat the purpose of the federal limitation of liability statute, nor will it interfere with the harmony or uniformity of admiralty law in its international or interstate relations. That the remedy may not exist in states other than Louisiana is not a tenable objection. The same was true in *Red Cross Line v. Atlantic Fruit Co., supra*, involving the New York Arbitration statute.

The Louisiana statute is wholly a regulation of the liability of insurers doing business in Louisiana upon [fol. 47] obligations voluntarily assumed by them there. We see no reason why it should not be applied to liability policies such as those here sued upon, even though the injuries were suffered upon navigable waters. Federal jurisdiction exists, and the complaints state a cause of action.

Reversed and Remanded.

Note (5): "Congress declares that the continued regulation * * * by the several states of the business of insurance is in the public interest and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation * * * of such business by the several states." 15 U. S. C. A. 1011.

"No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance * * * unless such act specifically relates to the business of insurance." 15 U. S. C. A. 1012(b).

BLURRED COPY

[fol. 48] No. 13887

GERTRUDE PICARD CUSHING, ETC., ET AL.,

versus

MARYLAND CASUALTY COMPANY, ET AL.

JUDGMENT—July 31, 1952

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that said cause be, and it is hereby, remanded to the said District Court for further proceedings in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellees, Maryland Casualty Company and Others, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 49] UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 13,887

[Title omitted]

PETITION FOR REHEARING—Filed August 18, 1952

To the Honorable, the Judges of the United States Court of Appeals for the Fifth Circuit:

The petition of Maryland Casualty Company and Home Insurance Company of New York, appellees, for a rehearing before the court *en banc*, with respect represents that the court erred:

[fol. 50] First

In holding, contrary in principle to decisions of this court, sitting in panels including other of its judges, that

state direct-action statutes may impair the obligations of maritime contracts.

Second

In disregarding the Congressional mandate that an action for death of a seaman resulting from his employer's fault, lies exclusively under the Jones Act.

Third

In holding that application of state direct-action statutes to maritime policies does not operate to circumvent and nullify both the letter and the spirit of national legislation for the limitation of shipowners' liability.

Fourth

In failing to hold that pendency of a limitation-of-liability proceeding instituted in admiralty by an insured shipowner, itself precludes a direct action at law under a state statute against the shipowner's insurer.

Fifth

In holding that the McCarran Act sanctions such application of state direct-action statutes to marine insurance as to effect nullification of national legislation for limitation of shipowners' liability.

[fol. 51]

Sixth

In holding, contrary to the express provision of section 611 of the Louisiana Insurance Code, that the Louisiana direct-action statute is legislatively intended to apply to the marine policies at bar.

WHEREFORE petitioners pray that a rehearing be granted herein before the court *en banc*, that the order of this court rendered on the original hearing be recalled, and that the judgment of the district court be affirmed.

Deutsch, Kerrigan & Stiles, Attorneys for Petitioners-Appellees.

Eberhard P. Deutsch,
Rene H. Himel, Jr.,
Advocates.

I certify that the foregoing petition is filed in good faith and not for delay, and that copies thereof have been served on counsel for appellants.

[fol. 52] UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

[Title omitted]

BRIEF IN SUPPORT OF PETITION FOR REHEARING

May It Please the Court:

First

State Statutes May Not Impair Obligations of Maritime Contracts

It is submitted that the opinion of the court herein is contrary to holdings of judges of the court sitting in different panels.

Extension of state direct-action statutes to marine policies, themselves expressly prohibiting direct actions, patently permits state impairment of maritime contracts—a [fol. 53] result precluded by this court itself when composed of Judges Foster, Bryan and Dawkins.[1]

State direct-action statutes can no more alter the terms of marine insurance contracts than, as pointed out by Judge Hutcheson, sitting with Judges Russell and Strum, only a month prior to rendition of the instant opinion, they "may constitutionally impair the obligation of a contract to the extent of invalidating a valid 'no action' provision of a policy issued and accepted in another state."[2]

Judge Borah of this court, while a district judge, held expressly that such an action could not be sustained under the Louisiana direct-action statute.[3]

---

[1] The Minnie R, 1931 AMC 995 (CA 5), cert. den., 284 US 628.

[2] Fisher vs Home Indemnity Company, CA 5—June 30, 1952.

[3] Sanford vs Zurich General Accident & Liability Ins. Co., CA 655, ED La.

The court seeks to justify application of state direct-action statutes to maritime causes of action by reference to *Red Cross Line vs Atlantic Fruit Co.*,[4] which upheld application to a maritime contract, of a state law validating contractual arbitration provisions.

The grounds for the holding were (1) that the parties to the contract had voluntarily included therein an arbitration clause substantively valid under maritime law,[5] and (2) that the state statute concerned accordingly did "not attempt . . . to modify the substantive maritime law", but merely provided a common-law remedy for enforcement of an existing substantive maritime right.

[fol. 54] Since this court, in its instant opinion, recognizes the creation, by state direct action statutes, of a substantive right unrecognized by admiralty law, the *Red Cross* case is neither direct nor analogous precedent for this court's holding.[6]

Second

Jones Act Gives Exclusive Right of Action for Death of Seaman by Employer's Fault

This court observes that "even if there were no jurisdiction, nor any right of action, under the Jones Act . . . diversity of citizenship exists between all plaintiffs and the defendant insurers, and more than $3000 is involved in each suit. These circumstances support federal jurisdiction."

The court must simply have overlooked the fact that appellees were sued for the fault of the deceased seamen's employer, actions based on which may not be brought except under the Jones Act.[7]

---

[4] 264 US 109 (1924).

[5] The instant marine policies, precisely to the contrary, expressly prohibit direct actions, unknown to the maritime law.

[6] City of Norwich, 118 US 468 (1886); Donald T. Wright, 1940 AMC 291 (WD Ky.).

[7] Cosmopolitan Shipping Co. vs. McAllister, 337 US 783 (1949); Lindgren vs. United States, 281 US 38 (1930); Northern Coal Co. vs. Strand, 278 US 142 (1928).

BLURRED COPY

Third

Application of State Direct-Action Statutes to Marine Policies Nullifies National Legislation for Limitation of Shipowner's Liability.

The Supreme Court has declared emphatically that to "compel the shipowner to surrender his insurance in order [fol. 55] to have the benefit of limited liability . . . would defeat the principal object of the law" which was to encourage the merchant marine.[8]

Although the cited case involved hull insurance, and direct actions had not yet then come into being, the principle is obviously the same as that here concerned. The purpose of both hull and P&I coverage in marine insurance is to indemnify the insured shipowner for his own losses—not to provide a fund for claimants in his limitation proceeding.

It is submitted that the lucid and forceful discussion of this principle by the district judge is an incontrovertible exposition thereof. This court's misconstruction of his opinion is evidenced by its obvious error of fact in its suggestion that the analogy which he drew to the case of the *City of Norwich* was induced by the fact that "one of the policies also provides hull insurance".

No hull insurance policy or coverage whatever is involved in this litigation, as the district judge expressly recognized in holding that "it is clear from the reasoning in the *City of Norwich* that no real distinction can be drawn in this connection between hull and marine protection and indemnity insurance".[9]

To allow such P&I protection to be drained away by direct actions under state law, deprives the shipowner of the complete benefit of limitation of liability to the same extent as [fol. 56] if he were forced to surrender the full amount of his insurance coverage, as well as his vessel, into the limitation fund.

Such a result is affirmatively precluded by the federal

---

[8] City of Norwich, 118 US 468, 504 (1886).

[9] Cushing vs. Texas & Pacific Railway, et al., 1951 AMC 1878, 1882 (ED La.).

Limitation of Liability Act, as construed by the Supreme Court. As between the Congressional enactments for limitation of shipowners' liability, and a state direct-action statute—assuming both to be remedial and deserving of liberal application—certainly the federal legislation must prevail.

Fourth

Pendency of Proceeding in Admiralty for Limitation of Shipowners' Liability Precludes Direct Action under State Statute against Shipowners' Insurer

The Supreme Court has held directly that during pendency of a limitation proceeding, claims for loss or damage within the purview of that proceeding may not be asserted elsewhere. By this "statutory injunction", no other court may exercise jurisdiction over such claims.[10]

Even under the state direct-action statute, the present appellants have no claims, contractual or in tort, directly against the underwriters, but are merely permitted to assert against the underwriters their claims against the petitioning shipowner and charterer.[11]

[fol. 57] As shown, however, jurisdiction over such claims elsewhere than in the limitation proceeding, is expressly precluded by the statutory injunction of the federal Limitation of Liability Act.

This court has itself held that the federal legislation for the limitation of shipowners' liability is "practically written into", and precludes direct recourse against, the undertakings of shipowners' sureties,[12] whose position is closely analogous to that of marine P&I underwriters.[13]

---

[10] The San Pedro, 223 US 365 (1911); Providence & N. Y. SS Co., vs. Hill Mfg. Co., 109 US 578 (1883).

[11] Ruiz vs. Clancy, 182 La. 935 (1935); Graham vs. American Employers Ins. Co., 171 So. 471 (La. App.-1937).

[12] Société Napthes Transports vs. Bisso Towboat Co., 241 Fed. 463 (CA 5-1917), cert. den., 245 US 652. To the same effect: Monongahela River Consol. Coal & Coke Co. vs. Hurst, 200 Fed. 711 (CA 6-1912), cert. den., 226 US 608, 612.

BLURRED COPY

Further, even if marine underwriters were amenable to direct action under state statutes, they would themselves be entitled to the benefit of the Limited Liability Act. The Supreme Court has squarely so held with respect to shareholders of a shipowning corporation, who were subject, under state law, to direct actions for the corporation's debts.[14]

Fifth

McCarran Act does not Sanction State Regulation of Marine Insurance

This court's principal reliance, in disposing of appellees' position respecting the effect of federal legislation for limitation of shipowners' liability, was on the McCarran [fol. 58] Act. The court has now simply held in effect, that under the provisions of that Act, state direct-action statutes may displace the national Limitation of Liability Act.

As pointed out by the Supreme Court, Congress intended no more, in passing the McCarran Act, than removal from the field of state insurance legislation, of the ban of the commerce clause.

The McCarran Act was never intended to validate state laws contravening other provisions of the federal constitution, or violative of federal statutes dealing with subjects other than interstate commerce.[15]

This court itself, speaking through Judge Hutcheson, sitting with Judges Russell and Strum, only a month before

---

[13] The Supreme Court of Louisiana, in construing the direct-action statute of that State, has analogized the position of a liability insurer to that of a surety. Edwards vs. Royal Indemnity Co., 182 La. 171 (1935).

[14] Flink vs. Paladini, 279 US 59 (1929).

[15] Prudential Ins. Co. vs. Benjamin, 328 US 408 (1946): "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case." House Report No. 143 on the bill which became the McCarran Act.

rendering its instant opinion, held that state direct-action statutes may not "constitutionally impair the obligation of a contract (of insurance) to the extent of invalidating a valid 'no action' provision of a policy issued and accepted in another state".[16]

The McCarran Act must equally be held to be constitutionally powerless to allow state supersession of federal maritime legislation. The federal constitution lodges in the national government exclusive power to legislate in matters maritime. Even Congress cannot authorize the [fol. 59] states to legislate in that field, especially in impairment of express federal law.[17]

Sixth

Louisiana Direct-Action Statute Not Legislatively Intended to Apply to Marine Policies

Section 611 of the Louisiana Insurance Code, expressly providing that the Part of the Code containing the direct-action statute is to have no application to marine insurance, was not specifically called to the attention of this court on the original hearing because it seemed clear from the Code as a whole that the Legislature of Louisiana did not intend to invade the admiralty jurisdiction constitutionally reserved to the national government.

For this reason, the court apparently overlooked section 611 which is at the head of Part XIV of the Louisiana Insurance Code, and stated that "there is no indication in Sec. 655 (in the same Part of the Code) that the Louisiana Legislature intended to deny the right of direct action to persons covered by marine policies".

Section 611 declares unequivocally that "the applicable provisions of this Part shall apply to insurances other than ocean marine . . ." This court need hardly be reminded that "contrary to the opinion of most laymen, insurance on ships and cargoes on inland lakes and rivers is not

---

[16] Fisher vs. Home Indemnity Co., CA 5—June 30, 1952.

[17] Constitution, Article III, sec. 2; Article VI; The Thomas Barlum, 293 US 21 (1934); Knickerbocker Ice Co. vs. Stewart, 253 US 149 (1920).

BLURRED COPY

[fol. 60] Inland Marine insurance at all, but *Ocean Marine* business".[18]

It is submitted that this declaration places beyond dispute the clear intention of the Legislature of Louisiana to recognize the constitutional limitations on its own powers with respect to marine policies, by providing in unmistakable terms that the direct-action statute is to have no application to them.

Conclusion

P&I coverage, under policies expressly prohibiting direct actions against the underwriters, is carried by shipowners in reliance on the Supreme Court's holding that they, and not their creditors, will have the benefit of such insurance in the event of proceedings for limitation of liability.

P&I policies are issued in contemplation of the rules of law (1) that, as maritime contracts, they are governed by maritime, and not by state, law; (2) that under maritime law, the contractual provision in such policies prohibiting direct actions will be enforced; and (3) that liability under such policies will be limited by operation of federal legislation for limitation of shipowners' liability.

[fol. 61] This court's opinion, if permitted to stand, will tolerate direct subversion, by state statute, of federal policy expressed through national legislation.

Judge Borah of this court, while a judge of the Eastern District of Louisiana, and both present judges of the latter

---

[18] National Underwriter Service, FC&S Bulletins, Inland Marine, A-a-1, April, 1939. The term "ocean marine", like "wet marine", is simply used to distinguish true marine insurance from so-called "inland marine" or land transportation insurance, which does not cover marine or waterborne risks, but only fire, theft and related lines. 4 Appleman, Insurance, sec. 2104, pp. 4-5. Winter, in his leading work on "Marine Insurance", states that this subject does not include "what is improperly, due to lack of a better name, known as *Inland Marine* insurance". P. 117.

court, have all held that the Louisiana direct-action statute may not support such an action.[19]

This court has itself heretofore ruled directly, by other panels of judges, that state law can neither control the terms of marine policies nor even impair the obligations of land policies not issued in contemplation of such law.[20]

Because of this conflict in decisions by judges of this court, and because the opinion herein effects a complete upheaval of the established legal foundations of the marine insurance business everywhere, it is respectfully submitted that the foregoing petition for rehearing should be referred for consideration to this court *en banc*.

Deutsch, Kerrigan & Stiles, Attorneys for Petitioners-Appellees.

(S.) Eberhard P. Deutsch, Rene H. Himel, Jr., Advocates.

---

[19] Sanford vs. Zurich General Accident & Liability Ins. Co., Civil Action No. 655, Borah, DJ; Loveless vs. Jahncke Service, Inc., Civil Action No. 3121, Christenberry, DJ; and the instant action below, Wright, DJ.

[20] See footnotes 1 and 2, supra.

BLURRED COPY

[fol. 62] Opinion on Petition for Rehearing—Filed October 9, 1952

In the United States Court of Appeals for the Fifth Circuit

No. 13887

Gertrude Picard Cushing, Etc., et al., Appellants,

versus

Maryland Casualty Company, et al., Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

Before Holmes, Strum and Rives, Circuit Judges.

By the Court: It is considered and ordered that the petition for rehearing herein filed, be and the same is hereby denied.

Rives, Circuit Judge, I dissent.

Rives, Circuit Judge, Dissenting:

A reconsideration of this case compels me to agree with the opinion of the learned district judge (*Cushing vs. Texas & Pacific Railway, et al.*, 1951 A. M. C. 1878, Eastern District of Louisiana) that in the enactment of the Louisiana [fol. 63] direct-action statute (La. Rev. Stats. 1950, Tit. 22, Sec. 655) the Legislature of that State did not intend to invade the admiralty jurisdiction constitutionally reserved to the national government.

However that may be, the Louisiana direct-action statute cannot constitutionally be construed to cover Marine insurance policies in such manner as to nullify Congressional policy limiting a shipowner's liability. It is possible that a state law might subject to the claims of the injured persons any excess of the marine liability insurance over the amount required to indemnify the shipowner. There would be substantial justice in saying that in cases of virtual destruction of the vessel and freight the insurance company should not be allowed to escape paying for the damages to the injured persons, and a statute so directing

might not conflict with any feature of substantive admiralty law. However, it is not contended that the Louisiana direct-action statute is subject to that construction. In the recent case of *West et ux, vs. Monroe Bakery, Inc., et al.,* 217 La. 189, 46 So. 2d 122, 130, the Supreme Court of Louisiana quoted from an earlier case where that Court had set out the general objects, purposes and effect of the direct-action statute and italicized the following: *"The statute expresses the public policy of this State that an insurance policy against liability is not issued primarily for the protection of the insured but for the protection of the public."*

In *Aetna Ins. Co. vs. Houston Oil and Transport Co.,* 49 F. 2d. 121, 124, Circuit Judge Foster speaking for this Court [fol. 64] said, "Policies of marine insurance are governed by the general admiralty law." In that case a Texas statute authorizing recovery by a mortgagee to whom loss is payable under a fire insurance policy, notwithstanding the insured's breach of warranty, was held inapplicable to a policy covering a vessel on navigable waters. The Court said: "It was a maritime contract, and therefore governed by the general admiralty law and not by the law of Texas."

That principle was not changed by the McCarran Act, 15 U. S. C. A. 1011, *et seq.* That Act was passed to meet the *South Eastern Underwriters Association Case,* 322 U. S. 533, and was never intended to validate state laws contravening provisions of the constitution other than the commerce clause, or violative of federal statutes other than interstate commerce. *Prudential Insurance Company vs. Benjamin,* 328 U. S. 408.

The Louisiana direct-action statute cannot operate to restrict the shipowner's freedom to contract through insurance for his own protection and still to avail himself of the limitation of his liability under the Federal statute, 46 U. S. C. A. Sec. 183; it cannot be given the practical effect of preventing the shipowner from protecting himself against liability to an extent that includes his interest in the vessel and her freight. This principle seems to me to be settled by the opinion of the Supreme Court in *The City of Norwich,* 118 U. S. 468, 504, where it was said:

> "We are not only satisfied that the law does not compel the shipowner to surrender his insurance in order

BLURRED COPY

[fol. 65] to have the benefit of limited liability, but that a contrary result would defeat the principle object of the law. That object was to enable merchants to invest money in ships without subjecting them to an indefinite hazard of losing their whole property by the negligence or misconduct of the master or crew, but only subjecting them to the loss of their investment. Now, to construe the law in such a manner as to prevent the merchant from contracting with an insurance company for indemnity against the loss of his investment is contrary to the spirit of commercial jurisprudence. Why should he not be allowed to purchase such an indemnity? Is it against public policy? That cannot be, for public policy would equally condemn all insurance by which a man provides indemnity for himself against the risks of fire, losses at sea, and other casualties. To hold that this cannot be done tends to discourage those who might otherwise be willing to invest their money in the shipping business."

I am in agreement with what was so well said of that case by the learned district judge:

"It is true that in the City of Norwich the Supreme Court had before it for decision only the question of the accountability in limitation proceedings for the owner's hull insurance. However, it is clear from the reasoning in the City of Norwich that no real distinction can be drawn in this connection between hull and marine protection and indemnity insurance."

[fol. 66] For the foregoing reasons, I respectfully dissent.

[fol. 67] Order Denying Rehearing—October 9, 1952

[Title omitted]

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

"Rives, Circuit Judge, dissents."

[fol. 68] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] Supreme Court of the United States, October Term, 1952

No. 498

Maryland Casualty Company, et al., Petitioners,

vs.

Gertrude Picard Cushing, et al.

Order Allowing Certiorari—Filed March 9, 1953

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U.S.
DEC 11 1952

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~498~~ //

THE JANE SMITH

MARYLAND CASUALTY COMPANY, et al.,
Petitioners-Appellees Below,

versus

GERTRUDE PICARD CUSHING, et al.,
Respondents-Appellants Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EBERHARD P. DEUTSCH,
Proctor for Petitioners.

DEUTSCH, KERRIGAN & STILES,

RENÉ H. HIMEL, JR.,

Of Counsel.

BLEED THROUGH

INDEX

PAGE

I—Question Presented 2
II—Jurisdiction and Opinions Below 3
III—Summary Statement of Matter Involved 3
IV—Reasons Relied on for Allowance of Writ 6
A—State Impairment of Maritime Contracts and Uniformity of Maritime Law 6
B—Unimpaired Limitation of Shipowners' Liability 9
C—Exclusive Remedy under Jones Act 12
D—McCarran Act Inapplicable to Marine Insurance 13
V—Conclusion 14

APPENDIX A
Louisiana Direct-Action Statute 15

APPENDIX B
Limited Liability Act—(Extracts) 16

APPENDIX C
Jones Act 17

APPENDIX D
McCarran Act—(Extracts) 17

TABLE OF AUTHORITIES

Cases:

Aetna Ins. Co. vs Houston Oil & Transp. Co., 49 F2d 121, 1931 AMC 995 (CA 5), cert. den., 284 US 628 7
City of Norwich, The, 118 US 468 (1886) 4, 6, 8, 11

TABLE OF AUTHORITIES—(Continued)

	PAGE
Cosmopolitan Shipping Co. vs McAllister, 337 US 783 (1949)	13
Dickinson vs Petroleum Corp., 338 US 507 (1950)	7
Donald T. Wright, The, 30 Fed. Sup. 610, 1940 AMC 291 (WD Ky.)	8
Edwards vs Royal Indemnity Co., 182 La. 171, 161 So. 191 (1935)	11
Elbert vs Lumbermen's Mutual Casualty Co., 107 Fed. Sup. 299 (WD La.-1952)	7
Fisher vs Home Indemnity Co., 198 F2d 218 (CA 5-1952)	7
Flink vs Paladini, 279 US 59 (1929)	11
Garrett vs Moore-McCormack Co., 317 US 239 (1942)	8
Graham vs American Employers' Ins. Co., 171 So. 471 (La. App.-1937)	10
Hall-Scott Motor Car Co. vs Universal Ins. Co., 122 F2d 531, 1941 AMC 1646 (CA 9), cert. den., 314 US 690	8
Jansson vs Swedish American Line, 185 F2d 212, 1950 AMC 1959 (CA 1)	8
John Hancock Mut. Life Ins. Co. vs Bartels, 308 US 180 (1939)	7
Knickerbocker Ice Co. vs Stewart, 253 US 149 (1920)	13
Lewis vs Manufacturers Casualty Insurance Co., 107 Fed. Sup. 465 (WD La.-1952)	7, 8
Lindgren vs United States, 281 US 38 (1930)	13
Lottawanna, The, 21 Wall. (88 US) 558 (1874)	8
Monongahela River Consol. Coal & Coke Co. vs Hurst, 200 Fed. 711 (CA 6-1912), cert. den., 226 US 608, 612	11
Northern Coal Co. vs Strand, 278 US 142 (1928)	13

TABLE OF AUTHORITIES—(Continued)

PAGE

Providence & N. Y. SS Co. vs Hill Mfg. Co., 109 US 578 (1883) 10

Prudential Ins. Co. vs Benjamin, 328 US 408 (1946) 13

Red Cross Line vs Atlantic Fruit Co., 264 US 109 (1924) 7

Rodgers & Hagerty vs City of New York, 285 Fed. 362 (CA 2-1922), cert. den., 261 US 621 7

Ruiz vs Clancy, 182 La. 935, 162 So. 734 (1935) 10

San Pedro, The, 223 US 365 (1912) 10

Société Napthés Transports vs Bisso Towboat Co., 241 Fed. 463 (CA 5-1917), cert. den., 245 US 652 11

Stephenson vs List Laundry & Dry Cleaners, Inc., 168 So. 317 (La. App.-1936), aff'd, 186 La. 11, 171 So. 556 10

Thomas Barlum, The, 293 US 21 (1934) 13

Union Fish Co. vs Erickson, 248 US 308 (1919) 7

United States vs South-Eastern Underwriters Association, 322 US 533 (1944) 13

Statutes and Constitutional Provisions:

Constitution of the United States

Article III, Section 2 8

Article VI 8

Acts of Congress

RS 4283-4289, as amended by 19 Stat. 251, 23 Stat. 57, 49 Stat. 1479, 1480, 1481, 46 USC 183-189 (Limited Liability Act) 2, 8, 10, 11, 16

41 Stat. 1007, 46 USC 688 (Jones Act—Sec. 33 of Merchant Marine Act of 1920) 2, 5, 12, 17

PAGE

59 Stat. 33, 34, as amended by 61 Stat. 448, 15 USC 1011 et seq. (McCarran Act) 5, 6, 13, 17

Louisiana Revised Statutes of 1950
Title 22, Section 611 9
Section 655 ..... 4, 9, 15

Rules of Court:

Rules 51-54, Supreme Court Rules of Practice in Admiralty and Maritime Cases 10

Texts:

Appleman, Insurance, vol. 4, section 2104 9
National Underwriter Service, FC&S Bulletins, Inland Marine, Aa-1, April, 1939 9
Winter, Marine Insurance 117 9

Miscellaneous:
HR 143, 79th Cong., 1st Sess. (1945) 13

BLEED THROUGH

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No.

THE JANE SMITH

MARYLAND CASUALTY COMPANY, et al.,
Petitioners-Appellees Below,

versus

GERTRUDE PICARD CUSHING, et al.,
Respondents-Appellants Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray for issuance of a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit (Rives, J., dissenting) reversing the District Court for the Eastern District of Louisiana, and sustaining the jurisdiction of that court over actions brought at law under a state statute directly against petitioners as marine underwriters of the owner and charterer of the

Towboat JANE SMITH by representatives of seamen lost with the vessel, despite injunctive process issued in limitation proceedings instituted under federal legislation in admiralty prohibiting such actions against the owner and charterer, and despite provisions in the marine policies themselves prohibiting such direct actions against the underwriters; and petitioners respectfully show:

I

Question Presented

The novel and important question of law presented for determination in this proceeding is:

> May jurisdiction validly be granted by state statute over direct actions at law by representatives of deceased seamen against the marine underwriters of the shipowner and charterer (the seamen's employer), despite pendency of injunctive process in a proceeding instituted under federal legislation in admiralty for limitation of the liability of both the owner and charterer, restraining suits against them elsewhere than in the limitation proceeding, in impairment of provisions in the marine policies prohibiting such direct action, and in violation of the Jones Act, the Limited Liability Act and the constitutional grant to the federal government of exclusive jurisdiction in maritime matters?

Because of practically universal coverage of the liability of shipowners by marine protection and indemnity insurance, failure on the part of this court to determine this

BLEED THROUGH

question will inevitably leave marine underwriters uncertain or confused as to whether their policies are to be governed by the uniform maritime law, or by the vagaries of state enactments, *quoad* the rights of merchant seamen in all courts throughout the nation.

II

Jurisdiction and Opinions Below

The jurisdiction of this court is invoked under 28 USC 1254(1).

The opinion of the District Court (Tr 11-17) is reported at 99 Fed. Sup. 681, 1951 AMC 1878. The original opinion of the Court of Appeals (Tr 29-34), filed July 31, 1952, is reported at 198 F2d 536, 1952 AMC 1803. Rehearing was denied October 9, 1952, with a dissenting opinion (Tr 45-47), reported at 198 F2d 1021, 1952 AMC 1808.

III

Summary Statement of Matter Involved

Petitioners are the marine protection and indemnity underwriters of the owner and bare-boat charterer of the Towboat JANE SMITH.[1] Respondents are the representatives of five members of her crew, lost when the vessel capsized and sank following collision with a railway bridge spanning the Atchafalaya River in Louisiana.

[1] The policy of The Home Insurance Company insures both owner and charterer. The separate policy of the Maryland Casualty Company, by marine endorsement, runs in favor of the charterer (employer) only.

The owner and charterer of the towboat filed consolidated petitions in admiralty for limitation of liability. Injunctions were issued in the limitation proceeding restraining institution elsewhere than in that proceeding, of actions against the owner and charterer of the vessel. Respondents filed claims in the limitation proceeding against both owner and charterer, for damages for their decedents' deaths.

Thereafter, however, enjoined from suing the shipowner and charterer elsewhere than in the limitation proceeding in admiralty, respondents filed the present actions at law against petitioners as underwriters of the shipowner and charterer, under a Louisiana statute which creates a direct right of action against liability insurers of tortfeasors generally,[2] to enforce independent recovery against the underwriters, on the claims already filed against the owner and charterer in the limitation proceeding.

Each of the marine policies involved contains a clause prohibiting suit against the underwriter until after the assured shall actually have paid a loss, or shall have had his liability determined judicially.

The district judge dismissed the actions,[3] holding that the Legislature of Louisiana obviously did not intend its direct-action statute "to be applicable to marine insurance"; that "the value of the interest to be surrendered in limitation under our law is the value after the collision", and that under this court's opinion in *The City of Norwich*,

[2] Louisiana Revised Statutes of 1950, Title 22 (The Insurance Code), section 655, reprinted in Appendix A.

[3] Tr 11-18; Cushing vs Texas & P. Ry. Co., 99 Fed. Sup. 681 (ED La.-1951).

118 US 468, "the shipowner is then free to claim the insurance money as his own"; that Congress, "under its constitutional prerogative to provide laws affecting admiralty and maritime jurisdiction, has occupied the field of limitation of liability including contracts of insurance as they relate to the same"; and that "to give effect to the direct action statute of Louisiana by allowing these plaintiffs to proceed directly against the shipowner's insurers would not only work material prejudice to the characteristic features of the general maritime law, but would also contravene the essential purpose expressed by an Act of Congress in a field already covered by that Act".

The district court's judgment of dismissal was reversed by the Court of Appeals for the Fifth Circuit,[4] which held that the Louisiana direct-action statute is legislatively intended to apply to marine policies; that although the statute confers "upon an injured party a substantive right", nothing therein "undertakes to change the substantive admiralty law"; that construction of the statute to support jurisdiction over these actions is not precluded by the Jones Act, nor by pendency of the proceeding in admiralty for limitation of liability; and that the state statute was valid, in any event, under the McCarran Act.

Application for rehearing was denied without opinion by a majority of the Court of Appeals, Judge Rives dissenting in a written opinion[5] in which he stated: "A reconsideration of this case compels me to agree with the opinion

[4] Tr 29-34; 198 F2d 536 (CA 5-1952).
[5] Tr 45-47; 198 F2d 1021 (CA 5-1952).

of the learned district judge . . . that in the enactment of the Louisiana direct-action statute . . . the Legislature of that State did not intend to invade the admiralty jurisdiction constitutionally reserved to the national government"; that, in any event, "the Louisiana direct-action statute cannot constitutionally be construed to cover Marine insurance policies in such manner as to nullify Congressional policy limiting a shipowner's liability"; that these principles were "not changed by the McCarran Act" which "was never intended to validate state law contravening provisions of the constitution other than the commerce clause"; and that under the opinion of this court in *The City of Norwich*, "the Louisiana direct-action statute cannot operate to restrict the shipowner's freedom to contract through insurance for his own protection and still to avail himself of the limitation of his liability under the Federal statute".

In the present posture of the case, therefore, jurisdiction of the district court over the actions at bar is maintained on the holding of two judges of the Court of Appeals, with one judge of that court and the district judge holding against jurisdiction.

IV

Reasons Relied on for Allowance of the Writ

A—State Impairment of Maritime Contracts and Uniformity of Maritime Law

Entertainment of jurisdiction over the instant proceedings under a state statute which eliminates from the

marine policies involved their clauses prohibiting institution of such actions, effects state impairment of maritime contracts, a drastic change in substantive maritime law, and destruction of the nationwide uniformity of important features of that system, in conflict with decisions of this court and of the Courts of Appeals for the First, Second and Ninth Circuits, all noted hereunder.

It has been held directly by this court and by the Court of Appeals for the Second Circuit, that state laws are as powerless to alter the terms of maritime contracts—which are made in contemplation of the general admiralty law—as they are to impair the obligations of contracts generally.[6]

The reliance of the majority of the court below on *Red Cross Line vs Atlantic Fruit Co.*[7] is obviously misplaced. That opinion merely upheld procedural enforcement, pur-

[6] Union Fish Co. vs Erickson, 248 US 308 (1919); Rodgers & Hagerty vs City of New York, 285 Fed. 362 (CA 2-1922), cert. den., 261 US 621. See also: Aetna Ins. Co. vs Houston Oil & Transp. Co., 49 F2d 121 (CA 5-1931), cert. den., 284 US 628, in which it was held by the Court of Appeals for the Fifth Circuit that a marine insurance policy was to be "governed by the general admiralty law and not by the law of Texas". This, as recognized in the dissenting opinion in the case at bar (198 F2d 1021-22), gives rise to an intra-circuit conflict, and calls for review by this court. Dickinson vs Petroleum Corp., 338 US 507, 508 (1950). See: Fisher vs Home Indemnity Co., 198 F2d 218 (CA 5-1952), decided by a different panel of judges of the court, holding the Louisiana direct-action statute invalid as applied to a policy prohibiting direct actions, when issued in another state. In Elbert vs Lumbermen's Mutual Casualty Company, 107 Fed. Sup. 299 (WD La.-1952), Judge Dawkins has held the entire Louisiana direct-action statute to be an unconstitutional effort of the state legislature to confer jurisdiction on the federal courts by giving a direct right of action against underwriters invariably of diverse citizenship from local plaintiffs. In Lewis vs Manufacturers Casualty Insurance Company, 107 Fed. Sup. 465 (WD La.-1952), Judge Porterie held to the contrary, relying squarely on the majority opinion of the Court of Appeals in the instant case. This court has heretofore granted certiorari "because of conflict in the rulings of the Court of Appeals of the Fifth Circuit, due to the differing views of the judges composing the court . . ." Hughes, CJ, in John Hancock Ins. Co. vs Bartels, 308 US 180, 181 (1939).

[7] 264 US 109 (1924).

suant to state law, of an arbitration clause voluntarily included in a maritime contract and substantively valid under admiralty law. The instant decision of the Court of Appeals, on the contrary, permits nullification of otherwise valid "no-action" clauses in marine policies through enforcement of a concededly substantive right of action created by state statute [8]—a right certainly not sanctioned by the maritime law.[9]

Application of such statutes to govern maritime causes of action obviously effects a drastic and unconstitutional change in that law, as has been held in analogous situations by this court and by the Courts of Appeals for the First and Ninth Circuits.[10]

Further, in view of the practically universal marine insurance coverage of shipowners throughout the nation, application of state direct-action statutes to maritime causes necessarily has the substantive effect of defeating the intendment of the Limited Liability Act [11] in subversion of national uniformity of the maritime law,[12] and of the supremacy clause [13] of the Constitution.

---

[8] While the Court of Appeals said that "there is nothing in" the Louisiana direct-action statute "which undertakes to change the substantive admiralty law", it was constrained to hold that the act "confers upon an injured party a substantive right" against the tortfeasor's insurer. In Lewis vs Manufacturers Casualty Insurance Co., *supra*, note 6, 107 Fed. Sup. 465, 469 (WD La.-1952), Judge Porterie stated that the Louisiana direct-action statute "has been declared so many times to be substantive by final authority that we deny this phase of defendant's motion without elaboration by merely citing the latest case on the point"—the instant majority opinion of the Court of Appeals.

[9] The City of Norwich, 118 US 468 (1886); The Donald T. Wright, 30 Fed. Sup. 610 (WD Ky.-1939).

[10] Garrett vs Moore-McCormack Co., 317 US 239 (1942); The Lottawanna, 21 Wall. (88 US) 558 (1874); Jansson vs Swedish American Line, 185 F2d 212 (CA 1-1950); Hall-Scott Motor Car Co. vs Universal Ins. Co., 122 F2d 531 (CA 9-1941), cert. den., 314 US 690.

[11] See *post*.

[12] Constitution, Article III, sec. 2.

[13] Article VI.

The legislature of Louisiana, apparently recognizing the State's constitutional impotence to apply its direct-action statute to maritime causes of action, expressly provided that it was not to have such application, as the district court and the dissenting judge of the Court of Appeals both held.

The Louisiana direct-action statute is contained in Part XIV of the Louisiana Insurance Code.[14] Section 611, at the head of the same Part, declares unequivocally that "the applicable provisions of this Part shall apply to insurances other than ocean marine".

In ignoring this plain pronouncement, the majority of the Court of Appeals must simply have failed to realize that "contrary to the opinion of most laymen, insurance on ships and cargoes on inland lakes and rivers is not Inland Marine insurance at all, but Ocean Marine business".[15]

B—Unimpaired Limitation of Shipowners' Liability

Acceptance, under the state statute, of jurisdiction at law over these actions directly against the underwriters of a shipowner and charterer who have themselves petitioned for limitation of liability in admiralty, effects cir-

[14] Louisiana Revised Statutes of 1950, Title 22, section 655, reprinted in Appendix A.

[15] National Underwriter Service, FC&S Bulletins, Inland Marine, Aa-1, April, 1939. The term "ocean marine" like "wet marine", is used to distinguish true marine insurance from so-called "inland-marine" or land transportation insurance, which does not cover marine or water-borne risks at all, but only fire, theft and related lines. 4 Appleman, Insurance 4-5, sec. 2104. Winter, in his leading work on "Marine Insurance", states (p. 117) that this subject does not include "what is improperly, due to lack of a better name, known as *Inland Marine* insurance".

cumvention and practical nullification of the Limited Liability Act,[16] in conflict with a holding of the Court of Appeals for the Sixth Circuit, and with this court's decision that a petitioning shipowner may not be forced to surrender his insurance proceeds into his limitation fund.

Even under the Louisiana direct-action statute, the present respondents have no claims, contractual or in tort, directly against petitioners, but are merely permitted to assert, vis-a-vis petitioners, their claims against the insured shipowner and charterer who have instituted limitation proceedings.[17]

This court has held directly that during pendency of such proceedings, claims for "debts and liabilities of the" shipowner may not be asserted elsewhere.[18]

The instant opinion of the majority of the Court of Appeals conflicts on this point, with that of the Court of Appeals for the Sixth Circuit, which holds that the Limited Liability Act is written into, and precludes direct recourse

---

[16] 46 USC 183-189, reprinted in part in Appendix B. See also Rules 51 to 54, inclusive, of this court's Rules of Practice in Admiralty and Maritime Cases.

[17] Ruiz vs Clancy, 182 La. 935 (1935); Graham vs American Employers' Ins. Co., 171 So. 471 (La. App.-1937). These and other Louisiana cases hold that in proceedings under the direct-action statute, all defenses of the assured are available to the underwriter. In the case at bar, however, the majority of the Court of Appeals refused to follow this construction of the Louisiana statute by the Louisiana courts, in failing to grant to the instant underwriters their assureds' defense, under injunctive process in the pending limitation proceedings, against suits filed elsewhere. "Ordinarily, when an insured's immunity from an action is absolute, there likewise can be no action against the insurer." Stephenson vs List Laundry & Dry Cleaners, Inc., 168 So. 317, 320 (La. App.-1936), aff'd, 186 La. 11.

[18] The San Pedro, 223 US 365 (1912); Providence & N. Y. SS Co. vs Hill Mfg. Co., 109 US 578 (1883). "The said court shall also, on the application of the petitioner, make an order to restrain the further prosecution of all and any suit or suits against the petitioner and/or said vessel in respect to any claim or claims subject to limitation in the proceeding." Rule 51, Admiralty Rules of this court. Such an order is outstanding in the case at bar. Tr 19.

BLEED THROUGH

against, the undertakings—"impliedly subject to the enforcement of the limited liability statute"—of shipowners' sureties,[19] whose position is closely analogous to that of marine P&I underwriters.[20]

In thus depriving petitioners of the benefits of the Limited Liability Act, the majority opinion of the Court of Appeals further conflicts with this court's holding that the benefits of that Act are available to shareholders of a shipowning corporation subject, under state law, to direct actions for a corporation's debts.[21]

The majority decision of the Court of Appeals also conflicts with this court's emphatic declaration that to "compel the shipowner to surrender his insurance in order to have the benefit of limited liability . . . would defeat the principal object of the law" which was to encourage the merchant marine.[22]

While the cited case involved hull insurance, the principle is obviously the same as that here concerned. The purpose of both hull and P&I coverage is to indemnify an insured shipowner for his own losses, not to provide a fund for claimants in his limitation proceeding.[23]

---

[19] Monongahela River Consol. Coal & Coke Co. vs Hurst, 200 Fed. 711, 717 (CA 6-1912), cert. den., 226 US 608, 612. See also: Société Napthés Transports vs Bisso Towboat Co., 241 Fed. 463 (CA 5-1917), cert. den., 245 US 652.

[20] The Supreme Court of Louisiana, in construing the direct-action statute of that State, has analogized the position of a liability insurer to that of a surety. Edwards vs Royal Indemnity Co., 182 La. 171 (1935).

[21] Flink vs Paladini, 279 US 59 (1929).

[22] The City of Norwich, 118 US 468, 504 (1886).

[23] "It is true that in The City of Norwich, the Supreme Court had before it for decision only the question of the accountability in limitation proceedings for the owner's hull insurance. However, it is clear from the reasoning in The City of Norwich that no real distinction can be drawn in this connection between hull and marine protection and indemnity insurance." Wright, J., in Cushing vs Texas & P. Ry. Co., 99 Fed. Sup. 681, 684 (ED La.-1951), quoted with approval by Rives, Cct. J., in his dissent in the Court of Appeals, 198 F2d 1021, 1022 (CA 5-1952).

To allow marine insurance protection to be drained away by direct actions under state law, may deprive the shipowner of the benefits of limitation of liability under federal law as effectively as if he were required expressly by state law to surrender the full amount of his insurance coverage, as well as his vessel, into the federal limitation fund.

C—Exclusive Remedy under Jones Act

Retention of jurisdiction over these actions under the state statute is in open conflict with this court's holding that the provisions of the Jones Act,[24] which affords the exclusive remedy for seamen's death actions against their employers, may not be altered or extended by state law.

The Court of Appeals held that it was unnecessary to determine the question as to whether a state may extend the provisions of the Jones Act by creating a right of action against an employer's underwriter, because "even if there were no jurisdiction, nor any right of action, under the Jones Act . . . diversity of citizenship exists between all plaintiffs and the defendant insurers, and more than $3000 is involved in each suit. These circumstances support federal jurisdiction."

This is diametrically contrary to this court's repeated holding that the right of action for fault of a deceased seaman's employer lies against that employer alone, exclusively under the Jones Act which may not be altered

[24] Section 33 of the Merchant Marine Act of 1920, 41 Stat. 1007, 46 USC 688, reprinted in Appendix C.

or expanded by state law,[25] and which provides no right of action against the employer's underwriter.

D—McCarran Act Inapplicable to Marine Insurance

Interpretation of the McCarran Act [26] as sanctioning the application of state direct-action statutes to maritime law and federal legislation, is contrary to this court's holding as to the historical purposes and scope of that Act, and transgresses the Constitutional limitations, also recognized by this court, on the power of Congress to delegate its authority to legislate in maritime matters.

This court has recognized that the sole purpose of the McCarran Act was to remove the ban of the commerce clause from the sphere of state legislation dealing with insurance.[27] In passing the McCarran Act, Congress could not have intended, for it had no constitutional authority, to abdicate to the states its exclusive power to legislate in maritime matters.[28]

---

[25] Northern Coal Co. vs Strand, 278 US 142 (1928); Lindgren vs United States, 281 US 38 (1930); Cosmopolitan Shipping Co. vs McAllister, 337 US 783 (1949). This phase of the argument applies only to the claims made against petitioners as underwriters of the charterer-employer. See *supra*, fn. 1.

[26] 59 Stat. 33, 15 USC 1011, *et seq.* (relevant portions reprinted in Appendix D).

[27] Prudential Ins. Co. vs Benjamin, 328 US 408 (1946). "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the Southeastern Underwriters Association case." House Report No. 143, 79th Cong., 1st Sess., p. 3 (1945), on the bill which became the McCarran Act.

[28] The Thomas Barlum, 293 US 21 (1934); Knickerbocker Ice Co. vs Stewart, 253 US 149 (1920).

V

Conclusion

Petitioners accordingly respectfully submit that a writ of certiorari should issue herein to the Court of Appeals for the Fifth Circuit.

EBERHARD P. DEUTSCH,
Proctor for Petitioners.

DEUTSCH, KERRIGAN & STILES,

RENÉ H. HIMEL, JR.,

Of Counsel.

APPENDIX A

Louisiana Direct-Action Statute

"No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed prima facie evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the

insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state."

Louisiana Revised Statutes of 1950, Title 22 (The Insurance Code), section 655.

APPENDIX B

Limited Liability Act—(Extracts)

"The liability of the owner of any vessel . . . for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

RS 4283, as amended by 49 Stat. 1479, 46 USC 183(a).

"Whenever . . . the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each (claimant) . . . they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose . . . the owner of the vessel . . . may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

RS 4284, as amended by 19 Stat. 251, 46 USC 184.

"The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels. . . ."

RS 4286, 46 USC 186.

"Except as otherwise specifically provided therein, the (foregoing) provisions . . . shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation. . . ."

RS 4289, as amended by 49 Stat. 1481, 46 USC 188.

APPENDIX C

Jones Act

(Merchant Marine Act of 1920, section 33)

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

41 Stat. 1007, 46 USC 688.

APPENDIX D

McCarran Act—(Extracts)

"Congress declares that the continued regulation and taxation by the several States of the business of insurance

is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

59 Stat. 33, 15 USC 1011.

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: . . ."

59 Stat. 34, as amended by 61 Stat. 448, 15 USC 1012.

BLEED THROUGH

FILE COPY

Office - Supreme Court
FILED
APR 4 19
HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM, 1952

No. ~~498~~ //

THE JANE SMITH

MARYLAND CASUALTY COMPANY, et al.,
Petitioners,

versus

GERTRUDE PICARD CUSHING, et al.,
Respondents.

BRIEF FOR PETITIONERS.

EBERHARD P. DEUTSCH,
Proctor for Petitioners.

DEUTSCH, KERRIGAN & STILES,
RENE H. HIMEL, JR.,
Of Counsel.

INDEX

PAGE

I—OPINIONS BELOW 1

II—JURISDICTION 2

III—STATEMENT OF THE CASE 2

IV—SPECIFICATION OF ERRORS 5

V—ARGUMENT 6

A—The Louisiana direct-action statute is by its own terms inapplicable to marine insurance 6

B—Application of the Louisiana direct-action statute to the actions at bar would transgress the federal constitution by impairing the obligations of maritime contracts, infringing substantive features of the general maritime law, and abridging the scope of the national Limited-Liability Act 7

C—Pendency of limitation-of-liability proceedings instituted by petitioners' assureds, precludes application of the Louisiana direct-action statute to the actions at bar, by reason both of that statute's own provisions and of the intendment of the national Limited-Liability Act 11

INDEX—Continued

PAGE

1—Bar of the Louisiana Direct-Action Statute 11

2—Federal Bar of Surrender of Insurance into the Limitation Fund 12

3—Bar of the Federal Limited-Liability Act 13

D—By prescribing an exclusive remedy for injuries to crew members caused by fault of their employers, the Jones Act precludes the instant actions 16

E—The McCarran Act does not authorize application of the Louisiana statute to marine policies 17

APPENDIX A—Louisiana Direct-Action Statute .. 20

APPENDIX B—Limited-Liability Act (Extracts) .. 21

APPENDIX C—Jones Act 22

APPENDIX D—McCarran Act (Extracts) 23

BLEED THROUGH

TABLE OF AUTHORITIES.

PAGE

Cases:

Aetna Ins. Co. vs Houston Oil & Transp. Co., 49 F2d 121, 1931 AMC 995 (CA 5), cert. den., 284 US 628 9

American Stevedores vs Porello, 330 US 446 (1947) 8

Berwind-White Coal Mining Co. vs City of New York, 135 F2d 443, 1943 AMC 682 (CA 2) 8

Burke vs Massachusetts Bonding & Ins. Co., 209 La. 495, 24 S2d 875 (1946) 12

Butler vs Boston Steamship Co., 130 US 527 (1889) 11, 14

Cascade, The, 241 Fed. 206 (ED NY-1916) 16

City of Norwich, The, 118 US 468 (1886) ..3, 5, 10, 13

Compagnie Francaise vs Bonnasse, 19 F2d 777, 1927 AMC 1325 (CA 2), cert. den., 275 US 551 8

Cosmopolitan Shipping Co. vs McAllister, 337 US 783 (1949) 17

Dandridge vs Fidelity & Casualty Co., 192 So. 887 (La. App.-1939) 12

Department of Highways vs Lykes Bros. SS Co., 209 La. 381, 24 S2d 623 (1945) 6

Detroit Trust Co. vs The Barlum, 293 US 21 (1934) 18

Donald T. Wright, The, 30 FS 610, 1940 AMC 291 (WD Ky.) 10

Eastern Massachusetts Street Ry. Co. vs Transmarine Corp., 42 F2d 58. 1930 AMC 1454 (CA 1), cert. den., 282 US 883 8

Edwards vs Royal Indemnity Co., 182 La. 171, 161 So. 191 (1935) 12, 15

Flink vs Paladini, 279 US 59 (1929) 15

TABLE OF AUTHORITIES (Continued):

PAGE

Garrett vs Moore-McCormack Co., 317 US 239 (1942) 10, 11, 19
Gaugler vs Chicago, M. & P. S. Ry. Co., 197 Fed. 79 (DC Mont.-1912) 14
Graham vs American Employers' Ins. Co., 171 So. 471 (La. App.-1937) 12
Hall-Scott Motor Car Co. vs Universal Ins. Co., 122 F2d 531, 1941 AMC 1646 (CA 9), cert. den., 314 US 690 10
Hawn vs Pope & Talbot, 198 F2d 800, 1951 AMC 1604 (CA 3) 10
Hooper vs California, 155 US 648 (1895) 18
Howlett, Petition of, 75 FS 438, 1948 AMC 778 (ED NY) 14
Jansson vs Swedish American Line, 185 F2d 212, 1950 AMC 1959 (CA 1) 10
Jarka Corp. vs Hellenic Lines, 182 F2d 916, 1950 AMC 1305 (CA 2) 8
Jeffcott vs Aetna Ins. Co., 129 F2d 582, 1942 AMC 1021 (CA 2), cert. den., 317 US 663 8
Knickerbocker Ice Co. vs Stewart, 253 US 149 (1920) 18
Lewis vs Manufacturers Casualty Ins. Co., 107 FS 465 (WD La.-1952) 10
Lindgren vs United States, 281 US 38 (1930).. 17
Lottawanna, The, 21 Wall. 558 (1874) 10
Lovless vs Jahncke Service, Inc., Civil Action No. 3121, Eastern District of Louisiana, New Orleans Division (unreported) 17
Milwaukee, The, 48 F2d 842, 1931 AMC 412 (ED Wis.) 15
Monongahela River Consol. Coal & Coke Co. vs Hurst, 200 Fed. 711 (CA 6-1912), cert. den., 226 US 608, 612 16

BLEED THROUGH

TABLE OF AUTHORITIES (Continued):

PAGE

New Amsterdam Casualty Co. vs Soileau, 167 F2d 767, 6 ALR2d 128 (CA 5-1948), cert. den., 335 US 822 10

New York & Cuba Mail SS Co. vs Continental Ins. Co., 117 F2d 404, 1941 AMC 243 (CA 2), cert. den., 313 US 580 8

Northern Coal Co. vs Strand, 278 US 142 (1928) 17

Payne vs Jacksonville Forwarding Co., 290 Fed. 936 (CA 5-1923) 10

Providence & N. Y. SS Co. vs Hill Mfg. Co., 109 US 578 (1883) 14

Prudential Ins. Co. vs Benjamin, 328 US 408 (1946) 18

Red Cross Line vs Atlantic Fruit Co., 264 US 109 (1924) 9, 10

Rodgers & Hagerty vs City of New York, 285 Fed. 362 (CA 2-1922), cert. den., 261 US 621 8

Rosenthal vs The Louisiana, 37 Fed. 264 (CC La.-1889) 8

Ruiz vs Clancy, 182 La. 935, 162 So. 734 (1935)..12, 14

Sanford vs Zurich General Accident & Liability Ins. Co., Civil Action No. 655, Eastern District of Louisiana, Baton Rouge Division (unreported) 17

San Pedro, The, 223 US 365 (1912) 13

Société Napthés Transports vs Bisso Towboat Co., 241 Fed. 463 (CA 5-1917), cert. den., 245 US 652 .....14, 15

Southern Bell Telephone & Telegraph Co. vs Watts, 66 Fed. 460 (CA 4-1895) 14

Southern Pacific Co. vs Jensen, 244 US 205 (1917) 11

BLURRED COPY

BLEED THROUGH

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1952

No. 498

THE JANE SMITH

MARYLAND CASUALTY COMPANY, et al.,
Petitioners,

versus

GERTRUDE PICARD CUSHING, et al.,
Respondents.

BRIEF FOR PETITIONERS.

I

OPINIONS BELOW

The opinion of the District Court (Tr 11-17) is reported at 99 FS 681, 1951 AMC 1878. The original opinion of the Court of Appeals (Tr 29-34) is reported at 198 F2d 936, 1952 AMC 1803. Judge Rives' dissenting opinion on denial of rehearing (Tr 45-47) is reported at 198 F2d 1021, 1952 AMC 1803.

BLURRED COPY

II

JURISDICTION

Jurisdiction of the court was invoked by petition for certiorari under 28 USC 1254(1). Certiorari was granted on March 9, 1953.

III

STATEMENT OF THE CASE

Petitioners are the marine protection and indemnity underwriters of the owner and bare-boat charterer of the Towboat JANE SMITH.[1] Respondents are the representatives of five members of her crew, lost when the vessel capsized and sank following collision with a railway bridge spanning the Atchafalaya River in Louisiana.

The owner and charterer of the towboat filed consolidated petitions in admiralty for limitation of liability. Injunctions were issued in the limitation proceeding restraining institution elsewhere than in that proceeding, of actions against the owner and charterer of the vessel. Respondents filed claims in the limitation proceeding against both owner and charterer, for damages for their decedents' deaths.

Thereafter, however, enjoined from suing the shipowner and charterer elsewhere than in the limitation

[1] The policy of The Home Insurance Company insures both owner and charterer. The separate policy of Maryland Casualty Company, by marine endorsement, runs in favor of the charterer (employer) only.

proceeding in admiralty, respondents filed the present actions at law against petitioners as underwriters of the shipowner and charterer, under a Louisiana statute which creates a direct right of action against liability insurers of tortfeasors generally,[2] to enforce independent recovery against the underwriters, on the claims already filed against the owner and charterer in the limitation proceeding.

Each of the marine policies involved contains a clause prohibiting suit against the underwriter until after the assured shall actually have paid a loss, or shall have had his liability determined judicially.

The district judge dismissed the actions,[3] holding that the Legislature of Louisiana obviously did not intend its direct-action statute "to be applicable to marine insurance"; that "the value of the interest to be surrendered in limitation under our law is the value after the collision", and that under this court's opinion in *The City of Norwich,* 118 US 468, "the shipowner is then free to claim the insurance money as his own"; that Congress, "under its constitutional prerogative to provide laws affecting admiralty and maritime jurisdiction, has occupied the field of limitation of liability including contracts of insurance as they relate to the same"; and that "to give effect to the direct action statute of Louisiana by allowing these plaintiffs to proceed directly against the shipowner's insurers would not only work material prejudice to the characteristic features of the general

[2] Louisiana Revised Statutes of 1950, Title 22 (The Insurance Code), section 655, reprinted in Appendix A, *post,* p. 20.
[3] Tr. 11-18; 99 FS 681.

maritime law, but would also contravene the essential purpose expressed by an Act of Congress in a field already covered by that Act".

The district court's judgment of dismissal was reversed by the Court of Appeals for the Fifth Circuit,[4] which held that the Louisiana direct-action statute is legislatively intended to apply to marine policies; that although the statute confers "upon an injured party a substantive right', nothing therein "undertakes to change the substantive admiralty law"; that construction of the statute to support jurisdiction over these actions is not precluded by the Jones Act, nor by pendency of the proceeding in admiralty for limitation of liability; and that the state statute is valid, in any event, under the McCarran Act.

Application for rehearing was denied without opinion by a majority of the Court of Appeals, Judge Rives dissenting in a written opinion[5] in which he stated: "A reconsideration of this case compels me to agree with the opinion of the learned district judge . . . that in the enactment of the Louisiana direct-action statute . . . the Legislature of that State did not intend to invade the admiralty jurisdiction constitutionally reserved to the national government"; that, in any event, "the Louisiana direct-action statute cannot constitutionally be construed to cover Marine insurance policies in such manner as to nullify Congressional policy limiting a shipowner's liability"; that these principles were "not changed by the McCarran Act" which "was never intended to validate

[4] Tr. 29-34; 198 F2d 536.
[5] Tr. 45-47; 198 F2d 1021.

state law contravening provisions of the constitution other than the commerce clause"; and that under the opinion of this court in *The City of Norwich*, "the Louisiana direct-action statute cannot operate to restrict the shipowner's freedom to contract through insurance for his own protection and still to avail himself of the limitation of his liability under the Federal statute".

IV

SPECIFICATION OF ERRORS

The Court of Appeals erred in holding that the Louisiana direct-action statute is intended to apply to marine policies; and that such application thereof is permissible

a—Despite the exclusive constitutional federal jurisdiction over maritime matters, and the pendency of limitation-of-liability proceedings instituted by petitioners' assureds;

b—In actions brought by survivors of deceased seamen against the seamen's employer, despite provision by the Jones Act of another, exclusive, remedy;

c—In any event, under the McCarran Act.

V

ARGUMENT

A

The Louisiana direct-action statute is by its own terms inapplicable to marine insurance.

The legislature of Louisiana, apparently recognizing the State's constitutional impotence to apply its direct-action statute to maritime causes of action, expressly provided that it was not to have such application, as the district court and the dissenting judge of the Court of Appeals both held.[6]

The Louisiana direct-action statute is contained in Part XIV of the Louisiana Insurance Code.[7] Section 611, at the head of the same Part, declares unequivocally that "the applicable provisions of this Part shall apply to insurances other than ocean marine".[8]

In ignoring this plain pronouncement, the majority of the Court of Appeals must simply have failed to realize

[6] Respondents' contention below, and in their opposition to certiorari in this court, that the Louisiana Supreme Court has "held the Louisiana direct-action statute applicable in maritime matters", is incorrect. In the only case cited to support the statement, the Supreme Court expressly reserved decision on the question. *Department of Highways vs Lykes Bros. SS Co.*, 209 La. 381, 393 (1945).

[7] Louisiana Revised Statutes of 1950, Title 22, section 655, reprinted in Appendix A, *post*, p. 20.

[8] It is also worthy of note that the direct-action statute applies, by its terms, only to policies of "liability insurance", and that section 6 of the Louisiana Insurance Code clearly distinguishes between insurance against marine risks of all types [subparagraph (13)], and "liability insurance" so defined [subparagraph (4)], which can obviously include only policies on terrene risks.

that "contrary to the opinion of most laymen, insurance on ships and cargoes on inland lakes and rivers is not Inland Marine insurance at all, but Ocean Marine business'."[9]

B

Application of the Louisiana direct-action statute to the actions at bar would transgress the federal constitution by impairing the obligations of maritime contracts, infringing substantive features of the general maritime law, and abridging the scope of the national Limited-Liability Act.

At the outset of discussion of the constitutional issues, it should be noted that the judges of the Court of Appeals for the Fifth Circuit are in open disagreement with respect to the broad questions presented. The decision now under review, in which Judges Holmes and Strum concurred and from which Judge Rives dissented, cannot be reconciled with the later unanimous decision, by Judges Rives, Hutcheson and Borah of the same court, in *Wilburn Boat Company vs Fireman's Fund Insurance Company*, [10] that a state (Texas) statute may not impair otherwise valid provisions of marine insurance policies.

Entertainment of jurisdiction over the instant proceedings under a state statute which eliminates from the marine policies involved their clauses prohibiting institution of such direct actions, effects state impairment of mari-

---

[9] *National Underwriter Service*, FC&S Bulletins, Inland Marine, Aa-1, April, 1939. The term "ocean marine" like "wet marine", is used to distinguish true marine insurance from so-called "inland-marine" or land transportation insurance, which does not cover marine or water-borne risks at all, but only fire, theft and related lines. 4 *Appleman, Insurance* 4, 5, sec. 2104. *Winter*, in his leading work on *Marine Insurance*, states (p. 117) that this subject does not include "what is improperly, due to lack of a better name, known as *Inland Marine* insurance".

[10] 201 F2d 833 (CA 5-1953).

time contracts, a drastic change in substantive maritime law, and destruction of the nation-wide uniformity of important features of that system.[11]

It has been held directly by this court and by the Court of Appeals for the Second Circuit, that state laws are powerless to alter the terms of maritime contracts, made in contemplation of the general admiralty law.[12]

---

[11] The policy of Maryland Casualty Company here involved is a composite or mixed one, covering several distinct risks. The coverage in suit, by a separate marine endorsement, is against liability for injuries in maritime employment. Such coverage is marine insurance. *New York & Cuba Mail SS Co. vs Continental Ins. Co.*, 117 F2d 404 (CA 2-1941), cert. den., 313 US 580; 1 *Arnould, Marine Insurance* (13th ed.) 240, sec. 250. "When a wrong has resulted in personal injury or death to a human being, either upon inland waters of a country, or upon the high seas, the question of the liability of the actor, the ship or her owner is subject to the admiralty jurisdiction". *Benedict on Admiralty* (5th ed.), sec. 61. Marine insurance is that in which "the insurer assumes risks which are marine risks". *Jeffcott vs Aetna Ins. Co.*, 129 F2d 582 (CA 2-1942), cert. den., 317 US 663. It is well settled that the severable maritime portions of a mixed contract are cognizable in admiralty and are governed by maritime principles. *Berwind-White Coal Mining Co. vs City of New York*, 135 F2d 443 (CA 2-1943); *Eastern Massachusetts Street Ry. Co. vs Transmarine Corp.*, 42 F2d 58 (CA 1-1930), cert. den., 282 US 883; *Compagnie Francaise vs Bonnasse*, 19 F2d 777 (CA 2-1927), cert. den., 275 US 551. It is equally clear that the mere fact that certain incidental conditions and stipulations apply to both land and marine aspects of a policy is immaterial. *American Stevedores vs Porello*, 330 US 446, 456 (1947); *Rosenthal vs The Louisiana*, 37 Fed. 264 (CC La.-1889); *Benedict on Admiralty* (5th ed.), sec. 63. It follows that the Maryland policy, insofar as it applies to liability for maritime injuries, is a maritime contract, enforceable as such.

[12] *Union Fish Co. vs Erickson*, 248 US 308 (1919); *Rodgers & Hagerty vs City of New York*, 285 Fed. 362 (CA 2-1922), cert. den., 261 US 621. In *Jarka Corp. vs Hellenic Lines*, 182 F2d 916, 919 (CA 2-1950), which respondents cited below apparently as establishing a contrary rule, a provision of state law was applied on the express ground that it was "not in conflict with any essential feature of the general maritime law". Language in the opinion expressing doubt as to the supremacy of maritime law in marine causes must be considered disapproved by the later decision of the same court in *W. E. Hedger Transp. Corp. vs United Fruit Co.*, 198 F2d 376 (CA 2-1952); and has, in any event, been strongly criticized as contrary to the ever-growing maritime and commercial need "for a uniformity of obligation" without regard to state boundaries. *Note*, 36 *Cornell L. Quar.* 355, 360 (1951). *Standard Dredging Corp. vs Murphy*, 319 US 306 (1943), cited by respondents in their opposition to certiorari in this court, did not involve marine insurance at all, but public unemployment compensation.

Both before and after rendition of the decision under review, other panels of the Court of Appeals for the Fifth Circuit itself have held directly that marine policies are "governed by the general admiralty law and not by the law of"[13] any state; and that since a marine policy "is 'derived from', is 'governed by', and is a 'part of' the general maritime law of the world", a "suit which challenges the validity and effect of the terms of (such) a maritime contract does involve a characteristic feature of substantive admiralty law", to which "state law is inapplicable whatever it may be"[14]

It is palpably of the utmost importance to the interests of navigation and of maritime commerce that the uniform construction of marine policies—crystallized through centuries of usage—be preserved from the vagaries of state legislation.[15] This is a matter of no mere local concern.[16]

The reliance of the majority of the court below on *Red Cross Line vs Atlantic Fruit Co.*[17] is obviously misplaced. That opinion merely upheld procedural enforcement, pursuant to state law, of an arbitration clause voluntarily included in a maritime contract, and sub-

---

[13] *Aetna Ins. Co. vs Houston Oil & Transp. Co.*, 49 F2d 121, 124 (CA 5-1931), cert. den., 284 US 628.

[14] *Wilburn Boat Co. vs Fireman's Fund Insurance Co.*, 201 F2d 833, 837 (CA 5-1953).

[15] "Modern industrial development and transportation, which minimize the economic importance of state boundaries, argue for a uniformity of obligation. This uniformity is in large measure the aim of current activity in the field of commercial law . . . Determining the validity of a maritime contract by varying state law is out of line both with precedent and with modern commercial needs." *Note*, 36 *Cornell L. Quar.* 355, 360 (1951).

[16] "A successful blow at the doctrine (of maritime uniformity) would, I venture to say, shatter the whole fabric of our admiralty and maritime system." *Wright, Uniformity in the Maritime Law of the United States*, 73 *U. of Pa. L. Rev.* 123, 223, 255 (1925). See also *Stevens, Erie RR vs Tompkins and the Uniform General Maritime Law*, 64 *Harv. L. Rev.* 246 (1950).

[17] 264 US 109 (1924).

stantively valid under admiralty law.[18] The instant decision of the Court of Appeals, on the contrary, permits nullification of otherwise valid "no-action" clauses in marine policies through enforcement of a concededly substantive right of action created by state statute [19]—a right certainly not sanctioned by the maritime law.[20]

Application of such state statutes to govern maritime causes of action obviously effects a drastic and unconstitutional change in the substantive aspects of that law.[21]

Further, in view of the practically universal marine insurance coverage of shipowners throughout the nation, it is apparent that if direct-action statutes were applicable in maritime causes, the Limited-Liability Act,[22] which

---

[18] In their very recent opinion in *Wilburn Boat Co. vs Fireman's Fund Insurance Co.*, 201 F2d 833, 837, rendered January 29, 1953, another panel of judges of the Court of Appeals for the Fifth Circuit distinguished *Red Cross Line vs Atlantic Fruit Co.*, as being simply one "of the instances in which the courts have held that state law, as construed and applied, did not interfere with any characteristic feature of the maritime law".

[19] While the Court of Appeals said that "there is nothing in" the Louisiana direct-action statute "which undertakes to change the substantive admiralty law", it was constrained to hold that the act "confers upon an injured party a substantive right" against the tortfeasor's insurer. In *Lewis vs Manufacturers Casualty Insurance Co.*, 107 FS 465, 469 (WD La.-1952), Judge Porterie stated that the Louisiana direct-action statute "has been declared so many times to be substantive by final authority that we deny this phase of defendant's motion without elaboration by merely citing the latest case on the point"—the instant majority opinion of the Court of Appeals. See also *New Amsterdam Casualty Co. vs Soileau*, 167 F2d 767 (CA 5-1948), cert. den., 335 US 822.

[20] *The City of Norwich*, 118 US 468 (1886); *The Donald T. Wright*, 30 FS 610 (WD Ky.-1939).

[21] *Garrett vs Moore-McCormack Co.*, 317 US 239 (1942); *The Lottawanna*, 21 Wall. 558 (1874); *Payne vs Jacksonville Forwarding Co.*, 290 F2d 936 (CA 5-1923); *Jansson vs Swedish American Line*, 185 F2d 212 (CA 1-1950); *W. E. Hedger Transp. Corp. vs United Fruit Co.*, 198 F2d 376 (CA 2-1952); *Hawn vs Pope & Talbot*, 198 F2d 800 (CA 3-1952); *Hall-Scott Motor Car Co. vs Universal Ins. Co.*, 122 F2d 531 (CA 9-1941), cert. den., 314 US 690; *The Thielbek*, 241 Fed. 209 (CA 9-1917), cert. den., 245 US 661.

[22] 46 USC 183-189, reprinted in part in Appendix B, *post*, p. 21. See also Rules 51 to 54, inclusive, of this court's *Rules of Practice in Admiralty and Maritime Causes.*

"was enacted by Congress as a part of the maritime law of this country, and therefore is co-extensive, in its operation, with the whole territorial domain of that law",[23] would become a dead letter in the one or two direct-action states alone.[24] Injured parties in those states would circumvent the Federal Limitation of Liability Act just as the instant claimants are attempting to do, by proceeding against marine underwriters directly.

A more striking abridgement of the doctrine of maritime uniformity can hardly be conceived: "The necessary consequence would be destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish".[25]

C

Pendency of limitation-of-liability proceedings instituted by petitioners' assureds, precludes application of the Louisiana direct-action statute to the actions at bar, by reason both of that statute's own provisions and of the intendment of the national Limited-Liability Act.

1

Bar of the Louisiana Direct-Action Statute

The pending limitation proceeding brought by the assured owner and charterer concededly bars independent

---

[23] *Butler vs Boston Steamship Co.*, 130 US 527, 555 (1889).

[24] While a number of states authorize direct actions against liability insurers after judgment has been obtained against the assured, and some states permit direct actions against automobile liability insurers without prerequisite suit against the assured, it is believed that only the statute of South Dakota (Code of 1939, Section 31.3106) may be broad enough to sanction, as does the Louisiana act, direct actions in some classes of cases against insurers of liability arising otherwise than from operation of motor vehicles, without prerequisite suit against the assured.

[25] *Southern Pacific Co. vs Jensen*, 244 US 205, 217 (1917). "Disagreement over the Constitutional issues of the cases in the Jensen line has not extended to this principle." Mr. Justice Black in *Garrett vs Moore-McCormack Co.*, 317 US 239, 245 (1942).

suit against them by the instant respondents on the causes at bar. Under the Louisiana direct-action statute, which "merely gives a right of action against the insurer when the claimant has a cause of action against the insured",[26] the insurer may plead—against the injured party—all defenses of the assured [27] except purely personal ones, completely independent of the alleged tort, such as interspousal immunity.[28]

The bar of the limitation proceeding is not a personal matter between the assureds and any particular respondent, arising from some peculiar relation between them independently of the accident in suit, but is a defense against the claims of all parties injured in the instant casualty—a defense which "arose out of" and is "connected with, the accident".[29]

2

Federal Bar of Surrender of Insurance into the Limitation Fund

The decision under review conflicts with this court's emphatic declaration that to "compel the shipowner to surrender his insurance in order to have the benefit of limited liability . . . would defeat the principal object

---

[26] *Graham vs American Employers' Ins. Co.*, 171 So. 471, 476 (La. App.-1937). See also *Burke vs Massachusetts Bonding & Ins. Co.*, 209 La. 495 (1946).

[27] *Ruiz vs Clancy*, 182 La. 935 (1935); *Dandridge vs Fidelity & Casualty Co.*, 192 So. 887 (La. App.-1939). "Ordinarily, when an insured's immunity from an action is absolute, there likewise can be no action against the insurer." Hamiter, J., in *Stephenson vs List Laundry & Dry Cleaners*, 168 So. 317, 320 (La. App.-1936), aff'd, 186 La. 11.

[28] *Edwards vs Royal Indemnity Co.*, 182 La. 171 (1935).

[29] *Id.*, at 180, 181.

of the law", which was to encourage the merchant marine.[30]

While the cited case involved hull insurance, the principle is obviously the same as that here concerned. The purpose of both hull and P&I coverage is to indemnify an insured shipowner for his own losses, not to provide a fund for claimants in his limitation proceeding.[31]

To allow marine insurance protection to be drained away by direct actions under state law, may deprive the shipowner of the benefits of limitation of liability under federal law as effectively as if he were required expressly by state law to surrender the full amount of his P&I coverage, as well as his vessel, into the federal limitation fund.

3

Bar of the Federal Limited-Liability Act

The effect of the initiation of limitation proceedings by petitioners' assureds is that "the jurisdiction of the court to hear and determine every claim in that proceeding became exclusive",[32] and that those proceedings

---

[30] *The City of Norwich*, 118 US 468, 504 (1886).

[31] "It is true that in *The City of Norwich*, the Supreme Court had before it for decision only the question of the accountability in limitation proceedings for the owner's hull insurance. However, it is clear from the reasoning in *The City of Norwich* that no real distinction can be drawn in this connection between hull and marine protection and indemnity insurance." Wright, DJ, in *Cushing vs Texas & P. Ry. Co.*, 99 FS 681, 684, quoted with approval by Rives, Cct. J., in his dissent in the Court of Appeals, 198 F2d 1021, 1022.

[32] *The San Pedro*, 223 US 365, 372 (1912). The claims which cannot thereafter be asserted elsewhere are those for "any and all debts and liabilities of the owner, incurred on account of the ship". Id., at p. 376.

"supersede all other actions and suits for the same loss or damage in the state and federal courts".[33]

This court has repeatedly declared that the jurisdiction of limitation proceedings must necessarily be exclusive, if the primary ends of the limitation statute are not to be thwarted.[34] Entertainment of jurisdiction over the actions at bar would create the very multiplicity of suits, with consequent detriment to the orderly and equitable administration of all claims in a single proceeding, which it is the whole purpose of the limitation statute to avoid.

The claims urged in the present actions are incontestably "for the same loss or damage" as those filed in the limitation proceeding. It is equally clear that those claims—although asserted vicariously in actions brought against the underwriters under the state statute—are for claimed "debts and liabilities of the (assured) owner",[35] not for any independent liability of the underwriters themselves. The direct-action statute, in sum, simply compels "the insurer to respond . . . to the obligation of the insured".[36]

This court has held that the stockholders of a vessel-owning corporation—who, under a California statute,

---

[33] *Société Napthés Transports vs Bisso Towboat Co.*, 241 Fed. 463, 465 (CA 5-1917), cert. den., 245 US 652.

[34] See, e. g., *Providence & N. Y. SS Co. vs Hill Mfg. Co.*, 109 US 578, 594-5 (1883); *Butler vs Boston Steamship Co.*, 130 US 527, 552 (1889).

[35] See footnote 32, *ante*.

[36] *Ruiz vs Clancy*, 182 La. 935, 941 (1935). In the converse situation, the subrogated insurer correspondingly has, and can enforce, only the claim of his assured. *Southern Bell Telephone & Telegraph Co. vs Watts*, 66 Fed. 460 (CA 4-1895); *Gaugler vs Chicago, M. & P. S. Ry. Co.*, 197 Fed. 79 (DC Mont.-1912). See *Petition of Howlett*, 75 FS 438 (ED NY-1948), holding that the claim of an injured person and of his subrogated insurer constitute one single claim, although each filed separate pleadings in a limitation proceeding.

BLEED THROUGH

were individually amenable to direct actions on the corporation's debts—were entitled to limit their liability with respect to the vessel's tort. Justice Holmes pointed out that "this is not to ignore the distinction between a corporation and its members . . . but to interpret an untechnical word (owner) in the liberal way in which we believe it to have been used—as has been done in other cases'. This court accordingly ruled directly that "having no doubt of the comprehensive purpose of Congress, we should not be ingenious to construe the California (direct-action) statute in such a way as to raise questions whether it could be allowed to interfere with the uniformity which has been declared a dominant requirement for admiralty law".[37]

In another case strikingly close to the instant one, a vessel had been libeled, and released upon posting of bond, after which the vessel-owners petitioned for limitation. Cancellation of the release bond was ordered on the express ground that the liability of both principal and surety on such a bond is subject to limitation, the provisions of the limitation act being "practically written into" the bond.[38]

Similarly, it has been held, in a case in which an eventual petitioner for limitation had filed a supersedeas bond in appealing from a judgment rendered before initiation of the limitation proceedings, that "the obligation

[37] *Flink vs Paladini*, 279 US 59, 63 (1929). See also *The Milwaukee*, 48 F2d 842 (ED Wis.-1931).

[38] *Société Napthés Transports vs Bisso Towboat Co.*, 241 Fed. 463, 465 (CA 5-1917), cert. den., 245 US 652. The Supreme Court of Louisiana, in construing the direct-action statute of that State, has analogized the position of a liability insurer to that of a surety. *Edwards vs Royal Indemnity Co.*, 182 La. 171 (1935).

BLURRED COPY

of the surety was only coextensive with that of the principal, (and) that the liability incurred under the supersedeas bond was impliedly subject to the enforcement of the limited liability statute, and would be itself superseded, at least *pro tanto*, by the decree limiting such liability".[39]

Marine underwriters obviously issue their policies in contemplation of the provisions of the limitation statute,[40] which are, in fact, written into such policies, as in the case of those at bar, through the "no-action" clause.[41]

D

By prescribing an exclusive remedy for injuries to crew members caused by fault of their employers, the Jones Act precludes the instant actions.

The Court of Appeals held that it was unnecessary to determine the question as to whether a state may extend the provisions of the Jones Act[42] by creating a right of

---

[39] The court saw "no merit in the proposition that the surety can be held to full liability, notwithstanding the discharge of the principal". *Monongahela River Consol. Coal & Coke Co. vs Hurst*, 200 Fed 711, 717 (CA 6-1912), cert. den., 226 US 608, 612.

[40] The underwriters "must be presumed to have had in contemplation the system of maritime law under which (the contract) was made". *Union Fish Co. vs Erickson*, 248 US 308, 313 (1919). "One of the prime factors taken into consideration by the P&I underwriters is the ability of a shipowner, in the event of a catastrophe, to limit his liability." *Libby, Some Aspects of Protection and Indemnity Insurance*, 1952 *CCH Insurance Law Journal* 684, 689.

[41] The district court decision in *The Cascade*, 241 Fed. 206 (ED NY-1916), which respondents, on page 11 of their opposition to certiorari herein, incorrectly attribute to an appellate court, conflicts with *Spencer Kellogg Co. vs Hicks*, 285 US 502 (1932); and involved a simple employer's liability policy which expressly declared the insurer primarily liable to injured employees of the assured. Each instant marine policy provides liability thereunder only to the named assured, and only after actual payment of a loss by the assured, or after judicial determination of the assured's liability.

[42] Section 33 of the *Merchant Marine Act* of 1920, 41 Stat. 1007, 46 USC 688, reprinted in Appendix C, *post*, p. 22.

action against an employer's underwriter, because "even if there were no jurisdiction, nor any right of action, under the Jones Act . . . diversity of citizenship exists between all plaintiffs and the defendant insurers, and more than $3000 is involved in each suit. These circumstances support federal jurisdiction."

This is diametrically contrary to this court's repeated holding that the right of action for fault of a deceased seaman's employer lies against that employer alone, exclusively under the Jones Act which may not be altered or expanded by state law,[43] and which provides no right of action against the employer's underwriter.[44]

E

The McCarran Act does not authorize application of the Louisiana statute to marine policies.

Interpretation of the McCarran Act[45] as sanctioning the application of state direct-action statutes to maritime law and federal legislation, is contrary to this court's holding as to the historical purposes and scope of

[43] *Northern Coal Co. vs Strand*, 278 US 142 (1928); *Lindgren vs United States*, 281 US 38 (1930); *Cosmopolitan Shipping Co. vs McAllister*, 337 US 783 (1949). This phase of the argument applies only to the claims made against petitioners as underwriters of the charterer-employer. See footnote 1, *ante*.

[44] Judge Borah, now a member of the Court of Appeals for the Fifth Circuit, held directly, when on the district bench, that Jones Act suits may not be prosecuted against marine underwriters under the Louisiana direct-action statute. *Sanford vs Zurich General Accident & Liability Ins. Co.*, Civil Action No. 655, Eastern District of Louisiana, Baton Rouge Division (unreported). District Judge Christenberry has reached the same conclusion. *Loviess vs Jahncke Service, Inc.*, Civil Action No. 3121, Eastern District of Louisiana, New Orleans Division (unreported).

[45] 59 Stat. 33, 34, 15 USC 1011, et seq. (relevant portions reprinted in Appendix D, *post*, p. 23).

BLURRED COPY

that Act, and transgresses the constitutional limitations, also recognized by this court, on the power of Congress to delegate its authority to legislate in maritime matters.

This court has recognized that the sole purpose of the McCarran Act was to remove the ban of the commerce clause from the sphere of state legislation dealing with insurance.[46] In passing the McCarran Act, Congress could not have intended, for it had no constitutional authority, to abdicate to the states its exclusive power to legislate in maritime matters.[47]

Another panel of the Court of Appeals for the Fifth Circuit has, in a later decision, recognized this fact explicitly.[48]

CONCLUSION

Marine insurance policies are issued in contemplation of the maritime law, including the continued effective-

---

[46] *Prudential Ins. Co. vs Benjamin*, 328 US 408 (1946). "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association* case." *House Report No.* 143, 79th Cong., 1st Sess., p. 3 (1945), on the bill which became the McCarran Act.

[47] *Detroit Trust Co. vs The Barlum*, 293 US 21 (1934); *Knickerbocker Ice Co. vs Stewart*, 253 US 149 (1920).

[48] "We . . . are of the opinion that the McCarran Act . . . only concerns the power of Congress to sustain existing and future legislation from attack under the commerce clause of the Constitution." *Wilburn Boat Co. vs Fireman's Fund Ins. Co.*, 201 F2d 833, 837 (CA 5-1953). The court also recognized that *Hooper vs California*, 155 US 648 (1895), which was decided with reference to the commerce clause, and not to the maritime law, was effectively overruled in *United States vs South-Eastern Underwriters Association*, 322 US 533 (1944).

ness of the national Limited-Liability Act. Such policies have never been considered subject to the vagaries of state legislation; and the decision below, if allowed to stand, would effect a complete upheaval of the established foundations of the marine insurance business everywhere.[49]

As this court pointed out in *Garrett vs Moore-McCormack Co.*,[50] it is no less important from the point of view of merchant seamen than from that of other maritime interests, that the "dominance of admiralty principles" in maritime causes be maintained.

It is accordingly respectfully submitted that the decision below should be reversed.

EBERHARD P. DEUTSCH,
Proctor for Petitioners.

DEUTSCH, KERRIGAN & STILES,
RENE H. HIMEL, JR.,
Of Counsel.

April, 1953.

---

[49] "This decision is presently causing concern in insurance circles (and) . . . until the situation is clarified there is bound to be some confusion". *1952 Report of the Regular Stated Meeting of the Association of Average Adjusters of the United States*, p. 2552.

[50] 317 US 239, 244 (1942).

APPENDIX A

Louisiana Direct-Action Statute

"No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that the insolvency or bankruptcy of the insured, shall not release the insurer from the payment of damages for injuries sustained or loss occasioned during the existence of the policy, and any judgment which may be rendered against the insured for which the insurer is liable which shall have become executory, shall be deemed *prima facie* evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer. The injured person or his or her heirs, at their option, shall have a right of direct action against the insurer within the terms and limits of the policy in the parish where the accident or injury occurred or in the parish where the insured has his domicile, and said action may be brought against the insurer alone or against both the insured and the insurer, jointly and in solido. This right of direct action shall exist whether the policy of insurance sued upon was written or delivered in the State of Louisiana or not and whether or not such a policy contains a provision forbidding such direct action, provided the accident or injury occurred within the State of Louisiana. Nothing contained in this Section shall be construed to affect the provisions of the policy or contract if the same are not in violation of the laws of this state. It is the intent of this Section that any action brought hereunder shall be subject to all of the lawful

conditions of the policy or contract and the defenses which could be urged by the insurer to a direct action brought by the insured, provided the terms and conditions of such policy or contract are not in violation of the laws of this state."

Louisiana Revised Statutes of 1950, Title 22 (The Insurance Code), section 655.

APPENDIX B

Limited-Liability Act—(Extracts)

"The liability of the owner of any vessel . . . for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

RS 4283, as amended by 49 Stat. 1479, 46 USC 183(a).

"Whenever . . . the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each (claimant) . . . they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose . . . the owner of the vessel . . . may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

RS 4284, as amended by 19 Stat. 251, 46 USC 184.

"The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels . . ."

RS 4286, 46 USC 186.

"Except as otherwise specifically provided therein, the (foregoing) provisions . . . shall apply to all seagoing vessels, and also to all vessels used on lakes or rivers or in inland navigation . . ."

RS 4289, as amended by 49 Stat. 1481, 46 USC 188.

APPENDIX C

Jones Act
(Merchant Marine Act of 1920, section 33)

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions

BLEED THROUGH

shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

41 Stat. 1007, 46 USC 688.

APPENDIX D

McCarran Act—(Extracts)

"Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."

59 Stat. 33, 15 USC 1011.

"(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

"(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: . . ."

59 Stat. 34, as amended by 61 Stat. 448, 15 USC 1012.

BLURRED COPY

COPY

FILED
OCT 26 1
HAROLD B. WILLE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 11

THE JANE SMITH

MARYLAND CASUALTY COMPANY, et al.
Petitioners

versus

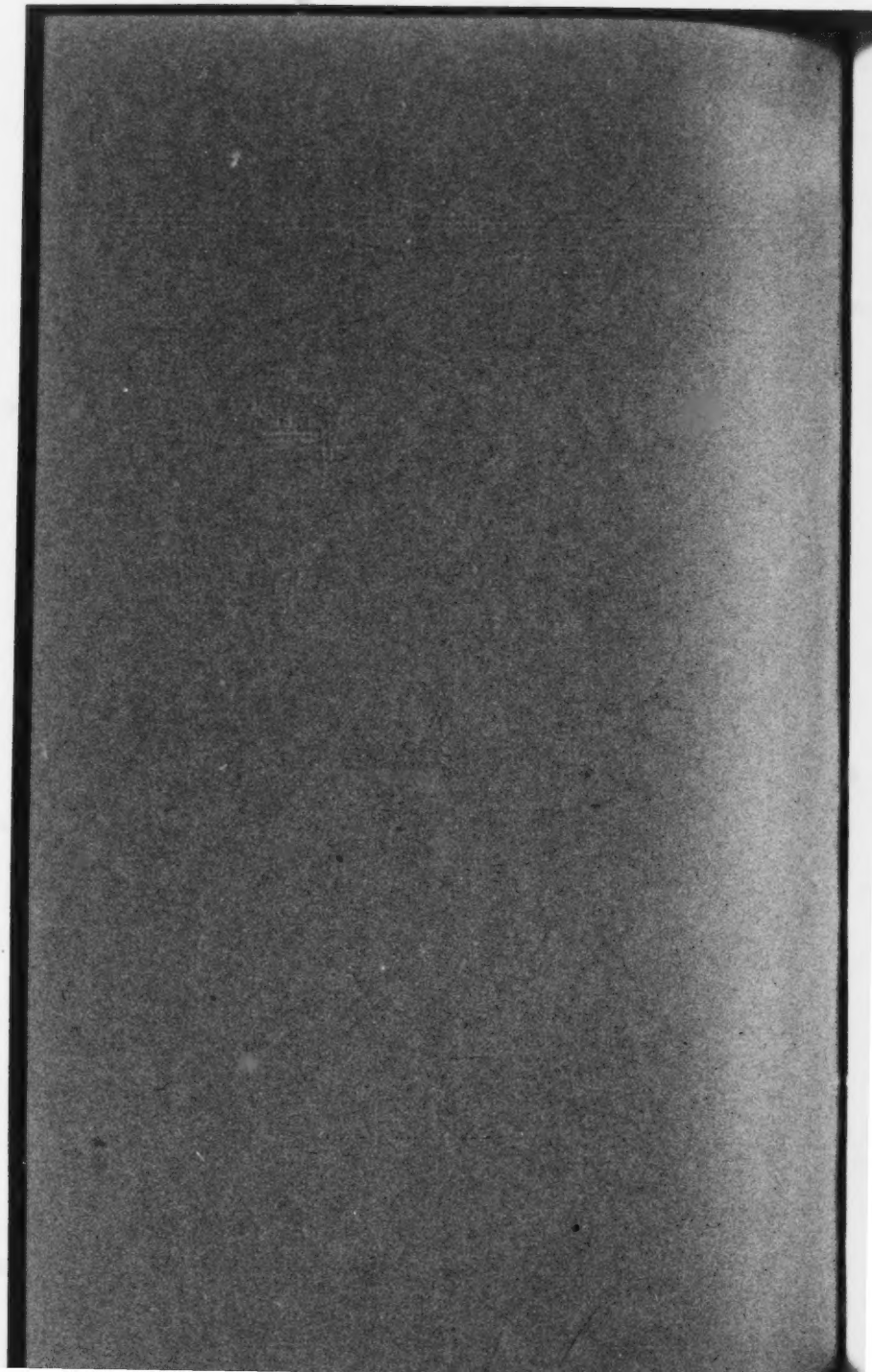
GERTRUDE PICARD CUSHING, et al.
Respondents

SUPPLEMENTAL BRIEF FOR PETITIONERS

EBERHARD P. DEUTSCH
Attorney for Petitioners

DEUTSCH, KERRIGAN & STILES

RENÉ H. HIMEL, JR.
Of Counsel



SUBJECT INDEX

PAGE

A—The present actions are precluded by the Limited-Liability Act 2

B—The present actions are precluded by the rule of The City of Norwich 3

C—The ruling below, that the Louisiana direct-action statute is intended to apply to marine policies, should be reversed 5

TABLE OF AUTHORITIES

Cases:

City of Norwich, The, 118 US 468 (1886) 3
Green, Ex parte, 286 US 437 (1932) 2, 3
Helvering vs Stuart, 317 US 154 (1942) 5
Langnes vs Green, 282 US 531 (1931) 2, 3
Lovless vs Jahncke Service, Inc., Civil Action No. 3121, Eastern District of Louisiana, New Orleans Division (unreported) 6
Moore vs American Transp. Co., 24 How. 1 (1861) 5
Sanford vs Zurich General Accident & Liability Ins. Co., Civil Action No. 655, Eastern District of Louisiana, Baton Rouge Division (unreported) 6
Spiegel's Estate vs Commissioner, 335 US 701 (1949) 5
Steele vs General Mills, 329 US 433 (1947) 5

TABLE OF AUTHORITIES (Continued):

PAGE

Statutes:
Acts of Congress:
Limited-Liability Act, 46 USC 183-189 1
Jones Act, 46 USC 688 1
Louisiana Direct-Action Statute, Louisiana Revised Statutes of 1950, Title 22, Section 655 2
Miscellaneous:
Libby, Some Aspects of Protection and Indemnity Insurance, 1952 CCH Insurance Law Journal 684 4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 11

THE JANE SMITH

MARYLAND CASUALTY COMPANY, et al.
Petitioners

versus

GERTRUDE PICARD CUSHING, et al.
Respondents

SUPPLEMENTAL BRIEF FOR PETITIONERS

This case was argued and submitted to the court on April 27-28, 1953. On June 1, the court ordered the case restored to the docket for re-argument. No specific questions were assigned for discussion.

The case involves the question whether claimants in the limitation-of-liability proceeding instituted in admiralty by the owner and charterer of a vessel, may, despite the bar of the Limited-Liability Act,[1] maintain the present independent civil actions under the Jones Act[2] directly against the marine protection and indemnity under-

[1] 46 USC 183-189.
[2] 46 USC 688.

writers of the owner and charterer, pursuant to a Louisiana statute [3] which creates a direct right of action against liability insurers of tortfeasors generally.

All of the fundamental questions at issue have heretofore been briefed, and this supplemental memorandum is accordingly addressed only to three subordinate questions which arose in the course of discussion during the original oral argument.

A

The present actions are precluded by the Limited-Liability Act

The suggestion was made during argument that, under the rule of *Langnes vs Green*,[4] respondents might be entitled to proceed to judgment in the present jury actions, any judgment obtained by them to be enforceable only in the pending limitation proceeding of the shipowner and charterer.

The holding in *Langnes vs Green* and in its sequel, *Ex parte Greene*,[5] is that when only one claim arises from a marine casualty, so that there is no necessity for a concourse of claimants in a limitation proceeding, the sole claimant may be permitted to proceed at law so long, but only so long, as he concedes the shipowner's right to limit his liability.

---

[3] Louisiana Revised Statutes of 1950, Title 22 (The Insurance Code), section 655.
[4] 282 US 531 (1931).
[5] 286 US 437 (1932).

The instant casualty has engendered five separate personal injury claims, in addition to a putative claim for property damage to a bridge involved in the casualty. All personal injury claimants are now contesting, both in the present actions and in the limitation proceeding itself, the right of the shipowner and charterer to limit their liability.[6]

The only forum for orderly disposition of these claims, which aggregate far in excess of the value of the vessel, is the limitation concourse; and that is the only forum which has jurisdiction of the contest as to the right of limited liability.[7]

B

The present actions are precluded by the rule of The City of Norwich

This court decided, in *The City of Norwich*,[8] that a shipowner who limits his liability is entitled to retain the insurance proceeds on his vessel.

It is easily demonstrable that in every case except that of total loss of the vessel in the casualty, to allow claimants to drain away the shipowner's marine P&I insurance proceeds through direct actions will be to deprive the shipowner himself of those very proceeds.

---

[6] Both in brief and in oral argument, respondents have further insisted, affirmatively, that they are entitled to recovery of the full amount of their claims in the instant proceedings without regard to the disposition made thereof in the limitation proceeding.

[7] *Langnes vs Green*, *supra* note 4; *Ex parte Green*, *supra* note 5.

[8] 118 US 468 (1886).

In every case in which a vessel is surrendered in a limitation proceeding, the shipowner is entitled to indemnity by his P&I underwriters for the value of the vessel when surrendered.

This right of indemnity will be destroyed, and the fundamental purposes and uniform operation of the national Limited-Liability Act subverted, if the underwriters can be subjected by state statute to direct actions which siphon off the insurance coverage.[9]

Hull insurance proceeds are no substitute for P&I coverage, because the hull proceeds compensate only for damage sustained by the vessel in the casualty. The value of the vessel after the casualty, when she is surrendered in the limitation proceeding, can be compensated only by P&I proceeds.

It is no answer to say that the shipowner's right of limitation would be unaffected if his underwriter were subject to direct-action liability for the excess of policy coverage over the shipowner's limited liability, reserving to the latter, indemnity for the value of his vessel when surrendered.

A shipowner's P&I insurance rates are calculated on the assumption of a right to limited liability.[10] Absent that right, the shipowner would have to pay, in increased rates, the actuarial cost of denial of his right to limit.[11]

---

[9] Thus, if the vessel be worth $500,000 when surrendered, carry $500,000 of P&I coverage, and be subject to $1,000,000 of claims, the shipowner will be deprived of both his vessel and his insurance proceeds in their entirety, if the claimants may take the ship in the limitation proceeding and the insurance in direct actions.

[10] *Libby, Some Aspects of Protection and Indemnity Insurance*, 1952 *CCH Insurance Law Journal* 684, 689.

[11] This assumes the availability, at all, of such insurance without right to limit, a doubtful premise at best.

Such an indirect, but no less definitive, denial of a shipowner's right to limit liability would constitute effective circumvention, by state legislation, of the federal Limited-Liability Act, intended by Congress to aid American shipowners.[12]

C

The ruling below, that the Louisiana direct-action statute is intended to apply to marine policies, should be reversed.

In the course of the original argument, the question was asked whether this court should not accept the construction, by the United States Court of Appeals, of the Louisiana direct-action statute as intended to apply to marine policies.

This court has announced its general policy to leave undisturbed a holding on a question of state law by a federal Court of Appeals, at least when that court included a judge who is a lawyer of the state in question,[13] or when the holding was an affirmance of the judgment of a district court sitting in the state.[14]

The instant decision was rendered by a court which included no Louisiana lawyer, one of the judges expressly dissented from the holding as to construction of the Louisiana statute,[15] and the decision reversed the

---

[12] *Moore vs American Transp. Co.*, 24 How. 1, 39 (1861).
[13] *Spiegel's Estate vs Commissioner*, 335 US 701 (1949); *Helvering vs Stuart*, 317 US 154 (1942).
[14] *Steele vs General Mills*, 329 US 433 (1947).
[15] Tr 45; 198 F2d 1021.

judgment of the district court sitting in Louisiana. Both present judges of the district court have construed the Louisiana statute directly contrary to the construction given it by the Court of Appeals.[16]

Finally, the only member of the Court of Appeals for the Fifth Circuit who is a Louisiana lawyer, Judge Borah, when a district judge sitting in Louisiana, also construed the Louisiana statute directly contrary to the construction thereof adopted by two of his colleagues in the case at bar.[17]

In these circumstances, it is submitted that the question of construction of the Louisiana statute is a proper one for re-examination by this court.

CONCLUSION

For the reasons stated herein, and in petitioners' original brief, it is respectfully submitted that the decision below should be reversed.

EBERHARD P. DEUTSCH
Attorney for Petitioners

DEUTSCH, KERRIGAN & STILES

RENÉ H. HIMEL, JR.
Of Counsel

October, 1953

[16] Wright, DJ. in the case at bar; Christenberry, DJ. in *Loviess vs Jahncke Service, Inc.*, Civil Action No. 3121, Eastern District of Louisiana, New Orleans Division (unreported).

[17] *Sanford vs Zurich General Accident & Liability Ins. Co.*, Civil Action No. 655, Eastern District of Louisiana, Baton Rouge Division (unreported).

INDEX

		Pages
I.	INTRODUCTION	1
II.	STATEMENT OF FACTS	2
III.	ISSUE INVOLVED	9
IV.	THE WRIT SHOULD NOT BE GRANTED	10
	A. Congress, and the Unbroken Jurisprudence of This and Other Courts, Recognize the Propriety of State Regulation of Marine Insurance	10
	B. R.S. 22:655 Does not Violate the "Doctrine of Uniformity"	12
	1) No Essential Feature of Exclusive Federal Jurisdiction is Involved	13
	2) R.S. 22:655 is Remedial	14
	C. This Remedy Does Not Conflict With Exclusive Jones Act Remedy	16
	D. Limitation of Shipowners' Liability Not Even Involved in this Case	18
	E. Constitutional Issue on Conflict of R.S. 22:655 with Limitation of Liability Act Not Properly Before the Court	20
V.	CONCLUSION	21
	CERTIFICATE	22

TABLE OF AUTHORITIES

Cases

Cascade, The, 241 Fed 206 11

City of Norwich, 118 U.S. 468 19

Davies vs Consolidated Underwriters, 6 So (2d) 351, 199 La 459 ..... 4, 8, 17

Department of Highways vs Lykes Bros. SS Co., 209 La. 381, 24 So. (2d) 623 11

Gager vs Teche Transfer Co., 143 So. 62 14

Great Lakes Dredge & Dock Co. vs Kierajewski, 261 U.S. 479 15

Greaud vs Consolidated Underwriters, C.A. No. 389, Baton Rouge Div 11

Hooper vs California, 155 U.S. 648 10
Hudson vs Georgia Casualty Co., 57 Fed 2d 757..... 14
Just vs Chambers, 312 U.S. 383 13
New Amsterdam Casualty Company vs Soileau (C.A.5) 167 Fed. (2) 767 8
New Orleans Canal & Navigation Co. vs City of New Orleans, 12 La Ann. 364 20
Red Cross Line vs Atlantic Fruit Co., 264 U.S. 109, 44 S.Ct. 274 ..... 8, 14
Reppel vs Board of Liquidation, 11 F.Supp 799..... 20
Southern Pacific Co. vs Jansen, 244 U.S. 205, 37 S. Ct. 524 .....12, 13, 16
Standard Dredging Co. vs Murphy, 319 U.S. 306.....11, 13
West vs Monroe Bakery, 217 La 189, 46 So. 2d 122..... 4, 8
Western Fuel Co. vs Garcia, 257 U.S. 233 15
White vs Lykes Bros. SS Co., Adm No. 1648, Eastern Dist. of La, N.O. Division 11

STATUTES

Louisiana Insurance Code (La.R.S. Title 22)

Section 3 .....4, 6, 9
Section 621 4
Section 623 .....4, 6, 9
Section 653 ..... 6, 9
Section 655 .....1, 2, 4, 5, 6, 9, 11, 12, 13, 14 15, 16, 21
Section 983E 4, 9

FEDERAL STATUTES

Jones Act, 46 U.S.C. 688 .....16, 17
Limitation of Liability Statute 46 U.S.C., Section 183-189 .....8, 18, 19, 21
McCarran Act (15 U.S.C. 1011, 1012) 2, 4, 5, 8, 9, 10, 11, 12, 16, 18
Merchant Marine Act of 1920, 46 U.S.C. 885 (2) 2..... 11
Saving to Suitors Clause 28 U.S.C. 1333 14
Benedict on Admiralty, Vol. 1, p 79 13

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 498

MARYLAND CASUALTY COMPANY, et als,
Petitioners—Appellees Below,

versus

GERTRUDE PICARD CUSHING, et al
Respondents—Appellants Below

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. INTRODUCTION

This memorandum is submitted in opposition to the petition of Maryland Casualty Company and the Home Insurance Company of New York for the issuance of a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the 5th Circuit holding valid and constitutionally applicable to maritime torts and insurance policies La. R.S. 22:655 and the Federal

McCarran Act. R. S. 22:655 is a Louisiana statute exercising the police power of the State of Louisiana, as sanctioned by the McCarran Act, to regulate the business of insurance in Louisiana, specifically by requiring liability insurance policies written and delivered in Louisiana to afford a right of a direct action by an injured party against the liability insurer. Petitioners claim that both the Federal McCarran Act, and La. R.S. 22:655 are unconstitutional in their application here, on the supposed authority of an extension of the "Doctrine of Uniformity in Admiralty".

II. STATEMENT OF FACTS

The inaccuracies in, and the inadequacy of, the statement of the case in the petition for writs herein requires its restatement:

On May 19, 1950, the Towboat JANE SMITH capsized in the Atchafalaya River at Melville, Louisiana, on colliding with a railroad bridge, drowning five of its seamen. Shortly after the catastrophy both the owner (Charles C. Smith), and the bareboat charterer who was also the operator (Oil Transport Company), of the JANE SMITH, instituted limitation of liability proceedings on the admiralty side of the United States District Court for the Eastern District of Louisiana in which respondents were impleaded as the personal representatives of the deceased seamen having claims for their deaths. The owner and the charterer in that proceeding both sought complete exoneration from any responsibility to the families of the deceased seamen for the five deaths,

or in the alternative to limit their liability to the value of the JANE SMITH, then a worthless derelict.[1] Claims were duly filed by respondents in the limitation proceedings thus provoked by the owner and the charterer for the deaths, and such proceedings are still pending and are not affected in any way by this suit.

At the time of the catastrophy, both the owner, and the charterer were insured against liability for death, injury or disability incident to the ownership, operation and maintenance of the JANE SMITH by two liability insurance policies as follows:

1) A Standard Workmens' Compensation and Employers' Liability Insurance Policy issued by Maryland Casualty Company, in the amount of $10,000.00, containing a "Maritime Endorsement", in which charterer alone is the name assured.

2) A "Protection and Indemnity" policy issued by The Home Insurance Company of New York, in the amount of $170,000.00, in which both the owner and the charterer are named assureds.

Each of the above policies of liability insurance was actually physically written, issued, and delivered, in the City of New Orleans, State of Louisiana, and by their express terms each policy became effective only on issuance in Louisiana, as appears from the face of each of the policies in question.[2]

---

[1] The JANE SMITH was subsequently salvaged, and valued at $25,000.00, for which amount a stipulation was filed in the limitations proceedings.

[2] See Original Policies, transmitted to the Court along with printed Record.

According to the local law of Louisiana, an injured party, or upon his death his heir, is afforded a right of direct action against the liability insurer of the tortfeasor.[3] This right of a direct action against liability insurors is a part of the public policy of the State of Louisiana, of which the Louisiana Supreme Court has said[4]:

> "The statute expresses the public policy of this state that an insurance policy against liability is not issued primarilly for the protection of the insured but for the protection of the public."

Such public policy is expressed by a series of legislative provisions of the Louisiana Insurance Code exercising the police power of the State of Louisiana to regulate the business of insurance, and the issuance of policies of liability insurance, in Louisiana;[5] and such state regulations have the express sanction of the United States Congress by virtue of the McCarran Act[6] providing:

> "Congress declares that the continued regulation . . . by the several states of the business of insurance is in the public interest.
>
> "The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation . . . of such business."

Availing themselves of the right of a direct action

---

[3] La. R.S. 22:655.
[4] *Davies v. Consolidated Underwriters*, 199 La. 459, 6 So. 2d. 351. See also *West v. Monroe Bakery*, 217 La. 189, 46 So. 2d. 122.
[5] See Louisiana Insurance Code, La. R.S. 22:655; 983E; 621; 623, 3.
[6] 15 U.S.C. 1011, 1012(a).

gainst Maryland Casualty Company and Home Insurance ompany of New York thus afforded by Louisiana R.S. 2:655, as sanctioned by the McCarran Act, respondents rought the five consolidated civil actions here in question n the law side of the District Court against said insurors n their policies of insurance, (and also against the bridge-wner), alleging diversity of citizenship as a basis for urisdiction, and that the deaths were caused by the indi-idual, joint and several negligence of the bridge-tender, nd of the two named assureds under the aforesaid liability olicies, i.e., of the owner of the JANE SMITH, and of her harterer. Only the charterer was the employer of the lrowned seamen; the owner of the vessel had no employ-ment relations with them.

The insurors moved for a summary judgment in the District Court, pleading "no action" clauses of their policies as a defense, on the same grounds urged here for issuance of a writ of certiorari. It must be pointed out, however, that the Maryland Casualty Company policy, while it does contain a "no action" provision, immediately follows same by "Condition H" of its policy specifically revoking its "no action" clause in favor of the "direct action" procedure provided by Louisiana R.S. 22:655 as follows:—

> "*Condition H.* If the method . . . for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in the state in which any of the business operations herein described are conducted, such specific statutory provisions shall supersede such conditions in this contract inconsistent therewith."

Similarly, the Home Insurance Company policy provides:

> "No suit or action on this policy for the recovery of any claim, shall be sustainable . . . unless commenced within twelve (12) months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the state wherein this policy is issued, then in that event, no suit or action under this policy shall be sustainable unless commenced within the shortest limitation permitted under the laws of such State."

It is thus submitted that both the Maryland and the Home policies expressly recognized that the laws of the state wherein they are issued are paramount over, and substitute for, the policy provision; and both policies specifically stipulate for the application of the remedial and procedural laws of the state wherein they are issued where in conflict with policy provisions.

Moreover, both Maryland Casualty Company and Home Insurance Company, in issuing and delivering their policies in Louisiana, did so in contemplation of, and pursuant to, the following provisions of the Louisiana Insurance Code:—

> "Sec. 3. No person shall transact a business of insurance in this state without complying with the provisions of this Code.
>
> Sec. 623. Insurance contracts shall contain such standard provisions as are required by the applicable chapters of this Code . . .
>
> Sec. 653. Any insurance policy . . . hereafter issued,

> and otherwise valid, which contains any conditions or provisions not in compliance with the requirements of this Code shall not be rendered invalid thereby, but shall be construed and applied in accordance with such conditions and provisions as would have applied had such policy . . . been in full compliance with this Code.
>
> Sec. 655. No policy or contract of liability insurance shall be issued or delivered in this state, unless it contains provisions to the effect that . . . an action may . . . be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer within the terms and limits of the policy . . ."

Hence in voluntarilly issuing and delivering their policies within the State of Louisiana, both petitioners herein, Home Insurance Company and Maryland Casualty Company undertook and agreed that their policies should be amended to adopt the "direct action" provisions of the Louisiana Insurance Code as a part of their Louisiana contracts, in conformity with the requirements of Louisiana Law.

In any event, the United States Circuit Court of Appeals for the 5th Circuit reversed the decision of the District Court dismissing the complaints, and in a carefully reasoned opinion appearing at pp.29-34 of the Record, upheld respondents right to avail themselves of the Louisiana Direct Action statute against petitioners' objections, saying:

> "Appellees' contentions over-inflate a relatively simple proposition with apparent, but unreal, technical problems. Stripped of illusory technicalities, the

Louisiana statute merely creates in favor of one who has been wrongfully injured, an additional and cumulative remedy at law against an insurer who has agreed to indemnify the tort feasor against liability, by subrogating the injured person to all the rights of the insured within the terms and limits of the policy. Other existing remedies are not in the least impaired or affected. New Amsterdam Casualty Co. v. Soileau (CA-5) 167 Fed. (2) 767. Such contracts of insurance are for the benefit of the public, as well as of the insured employer. Davies v. Consolidated Underwriters, 6So. (2) 351; West v. Monroe Bakery, Inc., 46 So. (2) 122. The statute is simply a regulation by the state of insurance companies doing business within its boundaries, for which there is ample sanction in federal law. 15 U.S.C.A., 1011, 1012, the McCarran Act. The limitation of liability statutes, 46 U.S.C.A. 183, et seq., relate, not "to the business of insurance" as mentioned in the McCarran Act, but to the liability of shipowners. The object of that proceeding is to limit the liability of the owner, not to preclude injured persons from pursuing any remedy open to them against others. To permit such an action will not defeat the purpose of the federal limitation of liability statute, nor will it interfere with the harmony or uniformity of admiralty law in its international or interstate relations. That the remedy may not exist in states other than Louisiana is not a tenable objection. The same was true in *Red Cross Line v Atlantic Fruit Company, supra,* involving the New York Arbitration statute.

The Louisiana statute is wholly a regulation of the liability of insurers doing business in Louisiana upon obligations voluntarily assumed by them there. We see no reason why it should not be applied to liability policies such as those here sued upon, even though the injuries were suffered upon navigable waters. Federal

jurisdiction exists and the complaints state a cause of action.

III. ISSUE INVOLVED

It is thus apparent that no real issues are involved ere, for certainly so far as Maryland Casualty Company concerned, that Company has expressly stipulated in its licy provisions (Condition H) for the Louisiana Direct tion procedure of R.S. 22:655 to apply against it; and ome Insurance Company has at least inferentially done e same by its policy provision above quoted; while both ave accepted the Louisiana Direct Action provision as a rt of their policies by virtue of issuing and delivering em in Louisiana, subject to the provisions of the Louisia Insurance Code.[7]

At best, the issue is whether La. R.S. 22:655, expressg the public policy of the State of Louisiana to protect s people by the exercise of its police power in regulating e business of insurance within its borders so as to afford right of direct action by injured persons or their heirs gainst liability insurors is, along with the McCarran Act uthorizing and sanctioning it, unconstitutional as applied maritime torts. Simply to state the issue is to answer it. deed, petitioners here are suggesting that this court go the teeth, not only of the public policy of Louisiana, and Congress as expressed in the McCarran Act, but likewise voke its own unbroken jurisprudence upholding state gulation of insurance, including maritime; and to hold

---

a. R. S. 22:3, 623, 653, 655, 983 E.

Louisiana' regulation of liability insurance, and the McCarran Act, unconstitutional as applied to maritime torts on the tenuous excuse of the repudiated Doctrine of Uniformity in admiralty matters. That is the only issue involved.

IV. THE WRIT SHOULD NOT BE GRANTED

A. Congress, and the Unbroken Jurisprudence of This and Other Courts, Recognize the Propriety of State Regulation of Marine Insurance.

Ever since the early decision of this Court in *Hooper v. California*,[8] decided in 1894, state authority to regulate marine insurance has been fully recognized. There the Supreme Court said:—

> "The contention here is that inasmuch as the contract was one for marine insurance, it was a matter of interstate commerce, and as such beyond the reach of state authority . . : This proposition involves an erroneous conception of what constitutes interstate commerce.
>
> "Whilst it is true that in Paul v. Virginia, and in most of the cases in which it has been followed, the particular contract under consideration was for insurance against fire, the principle upon which these cases were decided involved the question of whether a contract of any kind, constituted interstate commerce. The court in reaching its conclusion upon this question was not concerned with any matter of distinction between marine and fire insurance, but proceeded upon the

---

[8] 155 U.S. 648.

broad analysis of the nature of interestate commerce . . ."

More recently, where state job insurance affected maritime employment, this Court, in *Standard Dredging Corp. v. Murphy*[9] held "In dealing with unemployment insurance, 'exclusive federal jurisdiction' is not affected at all." The United States Court of Appeals for the 2d Circuit held the Direct Action provision of the New York Workmen's Compensation Insurance Law applicable to maritime torts in *The Cascade*,[10] and prior to this case, a number of decisions in the United States District Courts in Louisiana had applied La. R.S. 22:655 to maritime torts, including Jones Act suits,[11] as have the Louisiana Courts.[12]

Congress has always recognized that marine insurance was regulated by state law. Its very definition of "Marine insurance companies" in the Merchant Marine Act of 1920[13] is:

"companies . . . authorized to write marine insurance . . . under the laws . . . of a state".

Finally recently in adopting the McCarran Act,[14] Congress specifically authorized and approved state regulation of "the business of insurance . . . and every person engaged

---

[9] 319 U. S. 306.
[10] 241 Fed. 206.
[11] *White v. Lykes Bros. SS. Co., Inc.* No. 1648 In Admiralty, Eastern District La.; *Greaud v. Consolidated Underwriters*, C. A. No. 389, Baton Rouge, Div.
[12] *Department of Highways v. Lykes Bros. SS. Co., Inc.*, 209 La. 381, 24 So. 2d 623.
[13] 46 U. S. C. 885 (2) 2.
[14] 15 U. S. C. 1011, 1012.

therein" in the broadest possible terms, certainly including maritime insurance, as follows:

> 1011 "Congress declares that the continued regulation . . . by the several states of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation . . . of such business by the several states."
>
> 1012 (a) "The business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation . . . of such business."
>
> b) "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such act specifically relates to the business of insurance."

Nothing can be clearer than the above to fully establish both that the Supreme Court of the United States and the Congress, as well as all other Courts, have specifically approved state regulation of marine insurance and marine underwriters.

B. R.S. 22:655 Does not Violate the "Doctrine of Uniformity".

Petitioner's principal reliance is placed on the outmoded case of *Southern Pacific Co. vs Jansen*[15] and the now severely restricted doctrine of uniformity in admiralty matters.

---

[15] 244 U. S. 205, 37 S. Ct. 524.

As said by Benedict:[16]

> "State legislation has been regarded in a wide variety of instances as effective to create rights, to establish principles of liability and even to create liens".

From time immemorial, local legislation has affected admiralty jurisdiction and maritime rights. Wherever it does, so-called "uniformity" is disrupted to the extent that local laws are enforced.

The doctrine of "Uniformity" got its principal impetus from the now repudiated decision of the Supreme Court in *Southern Pacific Co. vs Jensen.* But of that case, the Supreme Court recently said:[17]

> "Indeed the *Jensen* case has recently been severely limited, and has no vitality beyond that which may continue as to state workmen's compensation laws."

As pointed out in the Murphy[18] case, quoting from *Just vs Chambers:*[19]

> "Uniformity is required *only when the essential features of an exclusive federal jurisdiction are involved.*" (Emphasis added)

1) No Essential Feature of Exclusive Federal Jurisdiction is Involved.

No essential feature of an exclusive federal jurisdiction which will be involved by applying R.S. 22:655 in this case

---

[16] Admiralty, Vol. 1, p. 79.
[17] *Standard Dredging Co. v. Murphy*, 319 U. S. 306 at p. 309 (1943).
[18] Op. Cit. *supra*, Note 31.
[19] 312 U. S. 383.

has been pointed to here. It has been said only generally that "uniformity" will be interfered with. It is respectfully submitted that the burden is on those asserting it to show how, in view of the well established presumption of constitutionality of legislation, R. S. 22:655 involves such an essential feature. It is further submitted that such unconstitutionality cannot be shown in view of the authorities herein referred to.

2) R. S. 22:655 is Remedial

In the first place, R. S. 22:655 is a remedial statute, and has been held to be remedial both by the Louisiana[20] and the Federal[21] Courts. 28 U.S. C. 1333, reenacting the "Saving to Suitors" clause of the Judiciary Act of 1789, specifically provides, with respect to admiralty and maritime matters:

> ". . . saving to suitors in all cases all *other remedies to which they are otherwise entitled*" (Emphasis Added)

The United States Supreme Court in specifically holding the New York Compulsory Arbitration Law—a state remedial statute unknown to Maritime Law—applicable and enforceable in Admiralty and not destructive of "uniformity", said:[22]

> "By reason of the saving clause, state courts have jurisdiction in personnam, concurrent with the Admiralty Courts, of all causes of action maritime in their nature arising under charter parties . . . The

---

[20] *Gager v. Teche Transfer Co.*, 143 So. 62.
[21] *Hudson v. Georgia Casualty Co.*, 57 Fed. 2d 757.
[22] *Red Cross Line v. Atlantic Fruit Co.*, 264 U. S. 109, 44 S. Ct. 274.

"right of a common law remedy" so saved to suitors does not, . . . include attempted changes by the states in the substantive admiralty law, but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at the common law . . . the state having concurrent jurisdiction, is free to adopt such remedies and to attach to them such incidents, as it sees fit.

This state stature is wholly unlike those which have recently been held invalid by this Court. The Arbitration Law deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty.

Those (statutes) giving the substantive right to recover for negligence resulting in death were upheld because they merely supplemented the substantive maritime law and did not conflict with any essential feature of it. *Western Fuel Co. vs Garcia*, 257 U.S. 233, *Great Lakes Dredge & Dock Co. vs Kierajewski*, 261 U. S. 479, etc."

Hence R. S. 22:655, as a State remedial stature, is a remedy specifically "saved to suitors" in Admiralty and Maritime cases. As this proceeding is on the law side of the court under diversity of citizenship jurisdiction, the court must, then, apply the remedy of the state law "saved to suitors" by the Judiciary Act.

The claim asserted on page 13 of the Petition in this case that the McCarran Act is also unconstitutional in its application to marine insurance because Congress thereby exceeded its power and "trangresses the Constitutional limitations . . . on the power of Congress to delegate its authority to legislate in maritime matters . . . for it had no constitutional authority to abdicate to the states its exclusive power to legislate in maritime matters" represents such an extreme extension of the repudiated *Jansen* Doctrine of Uniformity as to require no further comment on what has already been said. Yet obviously this Court must be prepared to declare the McCarran Act at least partially unconstitutional to reach the result sought by petitioner.

C. This Remedy Does Not Conflict With Exclusive Jones Act Remedy.

In the first place, this action is against the insuror both of the owner, as well as the insuror of the charterer of the JANE SMITH. The Jones Act only provides a remedy for a seaman against his employer, in this case the charterer. The action against the insuror of the owner is not governed by the Jones Act at all, and hence is not affected in any way by the Jones Act.

Secondly, as pointed out by the Court below, these suits are a "remedy at law against an insurer who has agreed to indemnify the *tortfeasor* against liability, by subrogating the injured person to all rights of the insured within the terms and limits of the policy."[23] Jones Act liability is

---

[23] See R. p. 33.

included among the types of indemnification to which the insuror has agreed, and to which the injured person is subrogated. Hence the Jones Act is, and remains, the *measure* of the insurors liability, and the situation is absolutely no different than if the tortfeasor had gone bankrupt after his liability arose. Moreover, even in a limitation proceeding, the Jones Act liability is determined; the limitation merely acts as a bar to recovery against the owner or charterer personally, which it is the policy of the Louisiana legislature not to permit to interfere with recovery against his liability insuror because of the public policy in Louisiana, "that an insurance policy against liability is not issued primarilly for the protection of the insured but for the protection of the public."[24]

Finally, the direct action suit against the insurors is in no sense of the word an alteration or an extension of the Jones Act claims against the employer of the deceased seamen, but is a suit on the policy of insurance itself by the seamen as subrogees of the insured employer wherein, as above stated, the insured's Jones Act liability remains the measure of the insuror's liability, and the two claims, i.e., the seaman's Jones Act claim against the insured, and the insured's contract claim under the policy for indemnity against the insuror to which the seaman is subrogated, are telescoped together in one direct action. Certainly this is neither an alteration nor an extension of the Jones Act,

---

[24] *Davies v. Consolidated Underwriters*, 6 So. 2d 351.

but merely a proceedural short-cut device for getting immediately at the party who has assumed ultimate liability for the loss.

D. Limitation of Shipowners' Liability Not Even Involved in this Case.

Petitioners have dragged into this case the red herring of a supposed circumvention or nullification of the Limited Liability Acts.[25] Neither the shipowners, nor their liability, is involved here; they are not even parties to these suits. No funds of theirs—or liability—is involved, except as a measure of the insurors' liability.

In the first place, the Court is prohibited from entertaining any suggestion of a conflict between the Limited Liability Acts and La. R.S. 22:655, or if there is any such conflict, then it must be resolved in favor of La. R.S. 22:655, because the McCarran Act specifically provides:[26]

> "No Act of Congress shall be construed to invalidate, impair or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such act specifically relates to the business of insurance."

The Limited Liability Acts obviously do not "specifically relate to the business of insurance," and hence cannot even be considered as invalidating, impairing or superseding La. R.S. 22:655.

---

[25] 46 U. S. C. 183-189.
[26] 15 U. S. C. 1012 (b).

Secondly, these actions cannot possibly require a shipowner entitled to limitation to "surrender his insurance proceeds into his limitation fund" or any other fund. He is not entitled to any "insurance proceeds" under a liability policy! This is the great difference between this case and *City of Norwich*,[27] where hull insurance was involved.

Thirdly, it is well known that the Limited Liability Act was passed for the express purpose of protecting and safeguarding the shipping industry, and encouraging the development of an American merchant marine by relieving shipowners from the enormous risks of marine disasters so as not to expose their entire patrimony in one catastrophy. Congress carefully limited such protection to owners, and their direct counterparts—bareboat charterers who stood *in hac vice*. Congress certainly did not intend to afford such protection to marine insurers, whose very business it is to assume such risks for a substantial premium! And yet these very marine insurers would have this Court extend to them the protection Congress so carefully limited, and denied to them.

Indeed it is certainly questionable, and almost a species of fraud, for an insuror who accepted a substantial premium on the representation that it was affording $170,000.00 of insurance, to hide behind an owner's statutory immunity and seek to reduce such insurance to only $25,000.00. The premium exacted here by Home Insurance Company was $2,550.00—over 10% on the claimed ex-

---

[27] 118 U. S. 468.

posure—for only one years coverage!! Is not Louisiana's public policy, as expressed in its direct action statute, fair, proper and equitable in requiring an insuror to do no less than it undertook in affording to the injured party the protection and indemnity for which the insured paid, and to prohibit it from hiding behind the statutory immunity of the insured?

E) Constitutional Issue on Conflict of R. S. 22:655 with Limitation of Liability Act Not Properly Before the Court

Finally it is a well established principle of constitutional law that a court will never pass on the constitutionality of a statute or its application, except in a suit in which such issues are directly raised by parties whose interests will be adversely affected by such decision, and the issue cannot be avoided.[28] Here this Court is being asked to decide this case, not on the basis of any constitutional rights of the underwriters, but on the basis of a supposed deprivation of a right of the assured—who is not a party to this litigation—"to be reimbursed by his underwriters". It is thus apparent that the underwriters have no interest in the constitutional question here asserted because in any event they are liable only up to the extent of the limits of their policies, and it is indifferent to them to whom it is paid.

Thus the only person entitled to raise the question of

---

[28] See *Reppel v. Board of Liquidation*, 11 F. Supp. 799; *New Orleans Canal and Navigation Company v. City of New Orleans*, 12 La. Ann. 364.

whether a direct action under R. S. 22:655 impairs the insured's right to reimbursement on his policy, or his immunity under the Limited Liability Acts, is the insured himself. This the insured could have done by intervening in this suit, which he failed and neglected to do. Hence, it is apparent that such issue of constitutional law is not properly before the court.

V. CONCLUSION

It is respectfully submitted in view of the reasons and authorities hereinafter referred to that no special nor valid reasons are presented for the granting of a writ of certiorari by this Court, and that the constitutional issues raised, besides being patently invalid, are not properly raised by parties really at interest, whose interests will be adversely affected by a decision on the constitutional issues. The application for the writ should therefore be denied.

Respectfully,

JAMES J. MORRISON
Proctor for Respondents
1014 Pere Marquette Building
New Orleans, Louisiana

Of Counsel:

W. W. Ramsey, Esq.
Arthur Delahoussaye, Esq.
Raymond H. Kierr, Esq.
Brown & Rault, Esqs.

CERTIFICATE

I hereby certify that a copy of this memorandum was mailed to Eberhard P. Deutsch, Deutsch, Kerrigan & Stiles, Hibernia Bank Building, New Orleans, Louisiana, on this the 10th day of February, 1953.

James J. Morrison
Proctor for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

No. 498

MARYLAND CASUALTY COMPANY, et als.,
Petitioners-Appellees Below,

versus

GERTRUDE PICARD CUSHING, et al,
Respondents-Appellants Below.

REPLY BRIEF FOR RESPONDENTS

JAMES J. MORRISON,
Proctor of Respondents
1014 Pere Marquette Bldg.
New Orleans, Louisiana

COUNSEL:
W. Ramsey, Esq.
ur A. Delahoussaye, Esq.
mond H. Kleer, Esq.
en & Rault, Esq.

INDEX

Pages

I. INTRODUCTION 1

II. ARGUMENT 2

A. The Louisiana Direct Action Statute like that of New York and presumably other States, is Applicable to Marine Insurance. 2

B. The Louisiana Direct Action Statute Applied to this action impairs no obligation of any maritime contract, infringes no substantive feature of the general maritime law, and leaves unaffected the national Limited Liability Act. 4

C. The Limitation of Liability proceeding does not preclude the applicability of the Louisiana Direct Action Statute. 6

1) The Direct Action Statute is no bar to this Suit. 6

2) There is no Federal bar to this suit. 8

D) The Jones Act does not preclude this Remedy. 11

E) The McCarren Act. 12

III. CONCLUSION 17

CERTIFICATE 18

TABLE OF AUTHORITIES

Cases

Pages

Alaska Packers Ass'n v Industrial Accident Commission, 276 U.S. 467 (1928) 15

American Car & Foundry Co. vs Brassert, 289 U.S. 261 (1933) 8

Brooks v Bass, 184 So. 222 (1938) 8

Cascade, The, 241 Fed. 206 4

City of Norwich, 118 U.S. 468 8

Cooley v Board of Wardens, 12 How. 299 ..... 14, 15

Cushing v Maryland Casualty Co., 198 F.2d 536, (1952) 4

Department of Highways vs Lykes Bros. SS Company, (Unreported) but see 209 La. 381, 24 So. (2d) 623 (1945) 2

Edwards v Royal Indemnity Co., 182 La. 171 (1935) 8

Flink v Paladini, 279 U.S. 59 8

Grant-Smith-Porter Co. v. Rhodes, 257 U.S. 469 15

Hansen v Continental Ins. Co. of New York, 262 N.Y. 136, 186 N.E. 420 (1933) 3, 7, 11

Hooper v California, 155 U.S. 648 (1895) 12, 13

Industrial Commission v Nordenholt Co., 259 U.S. 263 15

Just v Chambers, 312 U.S. 383 ..... 5, 6

Keen v Overseas Tankship Corp., 1952 AMC 241, Certiorari denied 1952 A.M.C. 1281 9

INDEX—(Continued)

Pages

Kelly v Washington, 302 U.S. 1 14

Knickerbocker Ice. Co. vs Stewart, 253 U.S. 149 (1920) 12

Lee v Westchester Fire Ins. Co. of N.Y., Docket No. 308,690, Civil District Court, Parish of Orleans, Louisiana (Unreported) 2

Lusk v United States Fidelity & Guaranty Co., App. 1941, 199 So. 666 8

Miller's Indemnity Underwriters v Braud, 270 U.S. 59 (1926) 15

Paul v Virginia, 8 Wall. 158 (1869) 14

Prudential Ins. Co. v. Benjamin, 328 U.S. 408 (1946) 13, 14, 15, 17

Red Cross Line v Atlanta Fruit Co., 264 U.S. 109 ..... 5, 6

Robertson v California, 328 U.S. 440 (1946) 13, 16, 17

Rome v London and Lancashire Indemnity Co., 169 So. 132 (1926) 8

Société Napthés Transport v Bisso Towboat Co., 241 Fed. 463 8

Terminiello v Chicago, 337 U.S. 1, rehearing denied 337 U.S. 934 (1940) 2

United States v Southeastern Underwriters Ass'n, 322 U.S. 533 (1944) 12, 13, 17

Wilburn Boat Company v Fireman's Fund Ins. Co., 201 F. 2d 833 (C.C.A. 5, 1953) 4, 5, 6

Western Fuel Co. v. Garcia, 257 U.S. 233 15

STATUTES

Louisiana Civil Code

Pages

Articles 2315 (Wrongful death statute) 12

Article 3052 9

Louisiana Insurance Code

(La. R.S. Title 22)

Section 6 (13) (e) 2

Section 611 2

Section 655 (Direct action statute) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 17

Others

New York Insurance Law Section 109 (Direct action statute) 3, 11

McKinney's Consolidated Laws of New York, Sec. 167 (Direct action statute) 3, 11

New York Workmen's Compensation Statute 3

FEDERAL STATUTES

Jones Act, 46 U.S.C. 688 ..... 3, 11, 12, 14

Limitation of Liability Act, 46 U.S.C., Section 183-189 ..... 4, 6, 7, 8, 9, 10, 11

46 U.S.C. 183 (a), 184 7

46 U.S.C. 183 (b) (f) 10

Pages

46 U.S.C. 184 7

McCarran Act (15 U.S.C. 1011-12) 6, 12, 13, 14, 15, 17

Judiciary Act 28 U.S.C. 1333 6

TREATISES

Congressional Record, Vol. 40, Part 1 16

Arnould Marine Insurance & Average, 13th Edition, Vol. 1, pp. 10, 115-118, 345 ..... 2, 10

Huebner Marine Insurance, Chapter XIII, p. 144, 148 ..... 3, 10

Winter Marine Insurance, 2nd Edition, p. 252 ..... 3, 10

Brandeis' speech on behalf of Protective Committee of Policy Holders before the Commercial Club of Boston, October 26, 1905 16

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

No. 498

MARYLAND CASUALTY COMPANY, et als.,
Petitioners-Appellees Below,

versus

GERTRUDE PICARD CUSHING, et al.,
Respondents-Appellants Below

REPLY BRIEF FOR RESPONDENTS

I.

INTRODUCTION

Respondents, the widows and orphans of the deceased seamen, not being able to afford multiple briefs, have requested that their Memorandum in opposition to the petition for writs be considered as the principal brief on this appeal. That memorandum carries respondent's affirmative argument, and this brief will be limited to a rebuttal of the arguments pressed in petitioner's brief.

II.

ARGUMENT

A. The Louisiana Direct Action Statute, like that of New York and presumably other States, is Applicable to Marine Insurance.

Petitioner's first argument is based exclusively on local interpretation of the applicability of the Louisiana Statute—a question of local law which would seem to be precluded here by the decision below and other decisions. The Civil District Court for the Parish of Orleans has specifically overruled exceptions of no cause of action based on the inapplicability of the Statute to marine insurance in at least two cases, *Lee v Westchester Fire Insurance Co. of New York*,[1] and *Department of Highways v Lykes Bros. SS Company*,[2] The District Court's interpretation is binding on this Court.[3]

---

[1]Docket No. 308,690 (unreported). In this case an exception leveled by defendant at plaintiff's direct action suit specifically claimed that "it sets forth no right of action in that the policy allegedly issued by defendant . . . is a marine insurance policy under which no direct right of action can exist in favor of plaintiff," and similar arguments were made there as here. The Court, however, overruled the exception and held that the plaintiff could persue his direct action on a marine P & I policy.

[2]Unreported below but see 209 La. 381, 24 So. 2d 623 (1945).

[3]*Terminiello v Chicago*, 337 U.S. 1, rehearing denied 337 U.S. 934 (1940), where the Court held "that construction of the ordinance (by a Municipal Court) is a ruling on a question of State law that is as binding on us as though the precise words had been written into the ordinance." The holding in *Terminiello* case makes unnecessary arguing in detail that under the Louisiana Insurance Code, P & I insurance is not defined as "ocean marine" insurance excluded from a direct action by La. R.S. 22:611 as claimed in petitioner's brief at page 6, but is separately defined as "marine protection and indemnity insurance" in La. R.S. 22:6 (13) (e). Moreover, "ocean marine" insurance excluded generally from "The Insurance Contract" regulations of Part XIV of the Louisiana Insurance Code by 22:611 means traditional "ocean marine" insurance on ships, cargoes, and freights, and not the relatively new type of insurance against personal liability referred to as P & I insurance. See Arnould, MARINE INSURANCE AND AVERAGE, 13th Edition, Volume I,

The same argument was made with respect to the New York counterpart of the Louisiana Direct Action Statute and similarly rejected by the New York Courts in *Hansen v Continental Insurance Company of New York*[4] where, after securing a Jones Act judgment, and execution being returned unsatisfied, the injured person proceeded direct against the P & I underwriters pursuant to Section 109 of the New York Insurance law.[5] In overruling the defense that the New York Direct Action Statute was not applicable to marine insurance, the Court said at p. 421:

> ". . . No good reason is suggested for assuming that the provisions of Section 109 were not intended to apply to any policy issued by a stock company, then or thereafter authorized to insure against liability for personal injuries, whether on land or on sea.
>
> . . . That the traditional contract of marine insurance was one of indemnity for money actually paid or loss actually suffered, is no reason for exempting such policies from the operation of Section 109, when the companies issuing marine insurance choose to insure against loss arising from personal injuries. The same considerations of fairness and public policy which originally led to the enactment of Section 109 of the Insurance law . . . apply no less to the liability features of marine policies than to the policies originally contemplated by that section."

The Federal Court in New York similarly applied the direct action provision of the New York workmen's com-

---

pp 10, 115-118, 345. Winter, MARINE INSURANCE, 2nd Edition, p. 252. Huebner, MARINE INSURANCE, Chapter XIII, p. 144 and 148.

[4]262 N.Y. 136, 186 N.E. 420 (1933).

[5]Now Section 167 of McKinney's Consolidated Laws of New York.

pensation insurance law to marine P & I insurance in *The Cascade.*[6]

Hence it appears, contrary to the statement of petitioners, that neither the legislature, nor the Courts of Louisiana or New York, recognize any constitutional impotence in applying direct action statutes to maritime causes of action.

B. The Louisiana Direct Action Statute Applied to this action impairs no obligation of any maritime contract, infringes no substantive feature of the general maritime law, and leaves unaffected the national Limited Liability Act.

1.

In the first place, the irreconcilability asserted on page 7 of petitioner's brief to exist between the decision of the Fifth Circuit Court of Appeals in this case, and in *Wilburn Boat Company v Fireman's Fund Ins. Co.*[7] and the alleged "open disagreement" between the judges of that court with respect to the question presented here, obviously does not exist, because the *Wilburn Boat Company* unanimous opinion cites the opinion in this case with approval!—saying:[8]

> "The right of a common law remedy so saved to suitors does not include attempted changes by the states in the substantive admiralty law. *Cushing v Maryland Cas. Co.*, 198 F. 2d 536,538. There is and can be no doubt that *this suit* which challenges

[6]241 Fed. 206. The Federal District Courts in Louisiana have similarly so applied it in a number of cases, all unreported. See cases cited in Memorandum in Opposition to Petition, footnote 11.

[7]201 F 2d 833 (CCA 5, 1953).

[8]Id, at p. 837.

> the validity and effect of the terms of a maritime contract *does* involve a characteristic feature of substantive admiralty law". (Emphasis added)

Thus the new panel of judges of the Fifth Circuit approved the decision in this case, and distinguished the *Wilburn Boat Company* case from this on the ground that here, as in *Just v Chambers*,[9] and in *Red Cross Line v Atlantic Fruit Company*[10] referred to just above in the opinion, the state law involved affected not "a characteristic feature of substantive admiralty law," as in the *Wilburn* case, but merely a procedural or remedial remedy.

Pretermitting completely the question decided in the *Wilburn Boat Company* case of whether a state statute can impair the terms of a maritime contract involving a characteristic feature of admiralty law because that question is not in any way involved in this case, it would seem perfectly clear that insurance companies cannot regulate state remedies and state procedures by the terms of their contracts. The Constitution of the United States certainly does not give to insurance companies the right to regulate the remedies and the procedures in the courts of the State of Louisiana contrary to the will of the legislature and in violation of its laws, simply by inserting a contrary procedural or remedial provision in its policy!

The assertion that the Louisiana direct action statute impairs any enforceable obligation of a maritime contract is certainly to stretch the imagination. A contract with whom?—With the State of Louisiana that it would not adopt remedial laws inconsistent with or contrary to the

[9]312 U.S. 383.
[10]264 U.S. 109.

provisions of the contract? But there is no such contract! A contract with the insured? But the insured is not suing —and certainly a contract between the assured and his underwriters cannot bind either the legislature of Louisiana as to what its remedial laws applicable to suits on that contract should provide, or a third person's right to assert them. It must be emphasized that we are not concerned here with a suit between the parties to the insurance contract, as was the case in the *Wilburn Boat* proceedings fallaciously relied upon by petitioner, where the Court perhaps properly held that a state statute inconsistent with the general admiralty law could not affect substantive maritime contractual provisions based on such maritime law. Here we are concerned only with remedial rights as properly pointed out in the *Wilburn* case affecting state remedies expressingly saved to suitors by the Judiciary Act,[11] and the McCarran Act,[12] and beyond the reach of private contracts, maritime or otherwise. Hence the numerous decisions cited by petitioner of the supremacy of maritime law over local state substantive law are wholly inapplicable to this case. To the contrary, the line of decisions of this Court characterized by *Red Cross Line v Atlantic Fruit Company*[13] and *Just v Chambers*[14] is properly applicable.

C. The Limitation of Liability proceeding does not preclude the applicability of the Louisiana Direct Action Statute.

1.) The Direct Action Statute is no bar to this Suit.

---

[11]28 U.S. C. 1333.
[12]15 U.S.C. 1011, 12.
[13]*Supra*, note 10.
[14]*Supra*, note 9.

BLEED THROUGH

There is no bar of the Louisiana direct action statute. Petitioners misconceive completely the function and purposes of the Limited Liability Act. They speak of it in terms of a "bar" to the liability of the vessel owner. But a plain reading of the act shows that it is not a bar at all but simply a method of proceeding. In fact, in the limited liability proceeding, the owner's entire liability to the injured person is determined and then simply scaled down or reduced to an amount which "should not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."[15] An award must therefore be made to each claimant for the total amount of his injuries or damage, and then if "the whole value of the vessel and her freight for the voyage is not sufficient to make compensation to each (claimant)) . . . they should receive compensation from the owner of the vessel in proportion to their respective losses."[16]

Thus there is no bar—but simply a reduction of liability entirely personal to the owner. Indeed under the Louisiana Direct Action statute, once the judgment is rendered in the limitation proceeding fixing the amount of the damages of the claimant, then same would appear to be, in the language of other portions of the Louisiana Direct Action statute,[17] "*prima facie* evidence of the insolvency of the insured, and an action may thereafter be maintained within the terms and limits of the policy by the injured person or his or her heirs against the insurer." Thus respondents would appear to be entitled to recover against petitioners in all events in a derivative action, as in *Hansen v Continental Ins. Co., supra.*

---

[15]See 46 USC 183 (a), 184.
[16]46 USC 184.
[17]La R.S. 22:655.

BLURRED COPY

The ship owners' right to limit his liability is obviously an immunity personal to him as owner,[18] completely independent of the tort, and similar to the personal defenses of interspousal immunity,[19] soverign immunity,[20] and eleemosynary immunity,[21] held unavailable to liability insurors under the Direct Action statute by the Louisiana Courts.

2.) There is no Federal bar to this suit.

The inapplicability to this case of the decision of this court in the *City of Norwich* has already been pointed out, and little can be added to what has already been said by the Fifth Circuit Court of Appeals and in our Memorandum in opposition to the petition for writs herein.[22] *Flink v Paladini*[23] relied upon by petition in this case is obviously inapposite because there this court was protecting the very persons Congress intended to protect by piercing the corporate veil in precisely the same way that the California Statute itself pierced it. The stockholders were the ultimate owners both of the corporation and of the vessel involved, and the very parties Congress intended to protect. There is not even any suggestion that Congress intended to protect marine P & I underwriters by the Limited Liability Act. Similarly, with respect to the cases limiting recovery on surety and release bonds,[24] not only are such bonds posted in contemplation of limitation proceedings, but the personal liability of the owner indemnifies the

[18]See *American Car & Foundry Co. v Brassert*, 289 US 261 (1933).
[19]*Edwards v Royal Indemnity Co.*, 182 La. 171 (1935).
[20]*Rome v London & Lancashire Indemnity Co.*, 169 So. 132 (1936) *Brooks v Bass*, 184 So. 222 (1938).
[21]*Lusk v U.S. Fidelity & Guaranty Co.*, App. 1941, 199 So. 666.
[22]See Memorandum pp 18-20.
[23]279 U.S. 59.
[24]*Societé Napthés Transports v Bisso Towboat Co.*, 241 Fed. 463.

BLEED THROUGH

surety.[25] Hence again, to hold the surety beyond limitation would be to defeat the purpose of the limited liability statute by thus making the owner fully liable for indemnification. Here no such direct or indirect liability of the owner is involved because once having paid his P & I premium, which he must do in all events, the owner is not subject further to indemnify his P & I insurer.

Petitioner's argument that "marine underwriters obviously issue their policies in contemplation of the provisions of the limitation statute which are, in fact, written into such policies . . . through their 'no action' clause," and hence should receive the benefit of the limitation of liability statute,[26] is tantamount to a claim that underwriters can contract for an advantage against the public which Congress and the Legislature of Louisiana specifically denied them and allowed only to vessel owners. The implication that if the advantage of the no action clause is denied them, premiums would thereby be increased is effectively answered by Judge Learned Hand in his observation in *Keen v Overseas Tankship Corp.*[27] as follows:[28]

> "Substantially all maritime risks are insured, and if we must suppose that the addition of this risk will show in the premiums, in the end it will be likely also to show in freight rates; and so far as it does, the recovery will be spread among those who use the ships."

Indeed, the socio-economic theory of spreading the risks adopted by the Louisiana Direct Action statute as applied here to the shipping industry, is a vast improve-

[25]See Louisiana Civil Code, Article 3052.
[26]Petitioner's Brief, pp 16, 18-19.
[27]1952 A.M.C. 241, certiorari denied 1952 A.M.C. 1281.
[28]Id. at p. 246.

BLURRED COPY

ment over the theory of the limited liability acts, and does no violence thereto, Those acts, a product of 19th Century legal economics conceived prior to the development of liability insurance as presently known,[29] hark back to European mediaevalism in an effort to foster and protect shipping, without benefit of modern day refinements in liability insurance, and crudely shift the loss and carnage incident to marine disasters and the shipping industry, from shipowners to those immediately involved. In the case of the seamen who man the ships, and their families—ever present in marine disasters and the class who can least afford to bear the loss—it falls with crushing brutality, particularly in the case of seamen of inland vessels who are denied even the shipowner's tonnage contribution to their injury or death.[30] Every other American industry has avoided such economic barbarism by the adoption of the modern insurance techniques for spreading the risks of industrial catastrophy.

The Louisiana Direct Action statute, as applied here, adopts and achieves the enlightened, more subtle, effective and economically sound 20th Century ideal of alleviating the distress of the impecunious victims of marine disasters by spreading the loss industrywide through liability insurance, in the tradition of workmen's compensation and unemployment compensation insurance laws. Certainly the cost thereof will show up in perhaps increased P & I insurance premiums. But as said by Judge Hand:

---

[29]Marine P & I liability insurance in America is a relatively recent development (Huebner, MARINE INSURANCE, p. 144, 148, attributes it to growing out of Builders Risk Insurance. See also Arnould and Winter, op. cit. supra note 3), and at the time of the adoption of the Limited Liability Acts was available, if at all, only restrictively through British P & I Clubs.

[30]46 U.S.C. 183 (b), (f).

> ". . . it will be likely to show in freight rates; and so far as it does, the recovery will be spread among those who use the ships."

Thus the Louisiana Direct Action statute leaves the shipowner fully protected by the Limited Liability Acts insofar as he is not insured, at the same time achieving for the impecunious seamen and their families a measure of protection against the crushing economic burden shifted to them by the imperfections of the 19th Century Limited Liability Acts by applying 20th Century theories of socio-economic insurance legislation to their plight.

D. The Jones Act does not preclude this Remedy.

The Court's attention is again directed to the discussion of this subject in our Memorandum in opposition to the petition herein.[31] In *Hansen v Continental Insurance Company of New York*,[32] the fact that the injured employee first recovered against the insured in a Jones Act action, and subsequently brought a second derivative direct action against the P & I insurer, did not even suggest to the New York Court that the Jones Act was being extended by permitting the second suit on the insurance policy under the New York Direct Action statute. If it is not an extension of the Jones Act to permit a second suit after execution on the first is returned unsatisfied, then it is certainly no extension to telescope the two together as the Louisiana Direct Action statute has done. The procedual difficulty in the *Hansen* case and the necessity for two separate suits under the New York Direct Action statute simply proves the propriety and facility of the Louisiana Direct Action remedy.

---

[31]Pages 16-18.
[32]Supra, Note 4.

Finally, it must be emphasized that there are two facets to this suit only one of which involves a Jones Act action. This suit against Home Insurance Company as underwriters of the vessel owner, does not involve a Jones Act action at all, but is one arising purely and simply under the Louisiana wrongful death statute—Article 2315 of the Louisiana Civil Code.

E) The McCarran Act.

Petitioners take the flat position that the plenary powers of states to regulate insurance within their borders, including all the prior jurisprudence of this court supporting same, has been swept away by the decision of this court in the *Southeastern Underwriters Association* case,[33] and that neither Humpty Dumpty, all the king's horses and all the king's men, nor Congress nor the McCarran Act can put it back together again, at least so far as marine insurance is concerned. *Hooper v California*,[34] they say, has been overruled and Congress lacks constitutional authority to delegate to the states the regulation of marine insurance. The McCarran Act, it is argued, authorizing state regulation of "the business of insurance, and every person engaged therein," cannot constitutionally mean what it says, but must be restricted only to non-maritime insurance on the authority of *Knickerbocker Ice Co. vs Stewart*.[35] The petitioners conclude marine insurance must constitutionally be free from state regulation, and that both the Louisiana Direct Action statute, and the McCarran Act as authorizing it, are unconstitutional in their application to marine in-

[33] *United States vs Southeastern Underwriters Association*, 322 U.S. 533 (1944).

[34] 155 U.S. 648 (1895).

[35] 253 U.S. 149 (1920).

surance. Such extravagant claims are justified neither by the *Southeastern Underwriters* case nor the later developments in this field.

In the *Southeastern Underwriters* case, the majority opinion and even the dissenting opinions made it clear that the decision in that case as to the constitutionaltiy and enforceability of a federal statute regulating the business of insurance did not automatically wipe out the concurrent power of the states likewise to regulate insurance.[36] This is made crystal clear in the subsequent decision of this court in *Robertson v California*[37] where the court expressly stated:[38]

> "No such consequence has followed from the Southeastern decision. It did not wipe out the experience of the states in the regulation of the business of insurance or its effects for the continued validity of that regulation. . . . The commerce clause is not a guaranty of the right to import into a state whatever one may please absent a prohibition by Congress, regardless of the effects of the importation upon the local community. That is true whether what is brought in consists of deceased cattle or . . . unsound insurance."

In the first place, *Hooper v California* is expressly approved both in the *Southeastern Underwriters* case[39] and again in the *Robertson* case.[40] *Prudential Insurance Company v Benjamin*[41] decided the same day as the *Robertson* case certainly is no authority for restricting the scope of the McCarran Act. Indeed in the *Benjamin* case, the court

---

[36]See 322 U.S. at p. 548, 588.
[37]328 U. S. 440 (1946).
[38]Id at pp 457-459.
[39]Op cit. Supra Note 33, p. 543.
[40]Op Cit. Supra Note 37, p 444 Note 6.
[41]328 U.S. 408 (1946).

expressly upheld a state tax which might otherwise have been considered discriminatory on the basis of the authority granted to the state via the McCarran Act.[42]

In brief, petitioner's argument of the inapplicability of state regulations to marine insurance is but a repetition in a somewhat new and ingenious setting of the threadbare demands for immunity from state regulation of insurance repeatedly and unsuccessfully advanced at least since *Paul v Virginia.* It is the old familiar refrain that insurance being national and international in scope can only be regulated on a national scale. Only the setting is new—the emphasis being placed upon federal admiralty powers in this case, rather than upon federal commerce powers as in prior instances.

But the incidents and implications of Congressional authority to regulate in the admiralty field, are essentially no different than its authority to regulate in the field of interstate commerce. If Congress can abnegate its authority in favor of the States over interstate commerce by the McCarran Act as *Prudential Insurance Company v Benjamin* clearly held that it could, it can equally abnegate its authority to the States in maritime fields as clearly authorized by *Cooley vs Board of Wardens*[43] and *Kelly v Washington*[44] by the same McCarran Act in the interest of that coordinated action between Congress and the States, recognized as constitutional in the *Benjamin* case. Indeed the *Benjamin* case specifically recognizes the McCarran Act as authorizing state regulation of insurance in the admiralty field as follows:

---

[42]Id p. 421.
[43]12 How 299.
[44]302 U.S. 1.

> "The McCarran Act is, in effect, a determination by Congress that the business of insurance, though done in interstate commerce is not of such a character as to require uniformity of treatment within the distinction taken in the doctrine of *Cooley v Board of Wardens.*"[45]

Indeed all of the considerations raised here by petitioners in an admiralty setting have been raised and answered adversely to petitioners in a commerce setting in the *Benjamin* case, and to translate the language of the commerce authorities into the jargon of the sea, we have but to refer to the long line of cases epitomized by *Western Fuel Co. v Garcia*:[46]

> "The subject is maritime and local in character, and the specified modification of or supplement to the rule applied in admiralty courts, when following the common law, will not work material prejudice to the characteristic features of the general maritime law, nor interfere with the proper harmony and uniformity of that law in its international and interstate relations."

Thus Congress has legislatively determined by the McCarran Act that the regulation of marine insurance is local in character, will not work material prejudice to the characteristic features of the general maritime law, and does not interfere with its harmony and uniformity.

Indeed, it has long been suspected that the advocates of exclusive federal legislation for insurance, including

---

[45]Op cit. supra Note 41 at page 431, note 39.

[46]257 U.S. 233 at p. 242. See also *Grant-Smith-Porter Co. vs. Rhode*, 257 U.S. 469; *Industrial Commission v. Nordenholt Co.*, 259 U.S. 263; *Miller's Indemnity Underwriters v. Braud*, 270 U.S. 59 (1926); *Alaska Packers Ass'n v. Industrial Accident Commission*, 276 U.S. 467 (1928).

marine, are not so interested in uniformity of regulation, as in no regulation at all! As said on the floor of Congress in the early debates on Federal regulation of insurance:[47]

> ". . . The agitation in favor of the Federal Government assuming control of insurance companies was begun by the insurance officials themselves . . . The insurance officials who have clamored for Federal control are the men who do not want any control at all. They want to get out from the power of the jurisdiction of the 45 legislatures of the 45 sovereign states. They want a lax, easy, nominal control that will not control . . . ."

Louis D. Brandeis, later a Justice of this Court expressed himself forcibly on the subject, saying:[48]

> "The sole effect of a Federal law would be . . . to free the companies from the careful scrutiny of the commissioners of some of the States. It seeks to rob the State even of the right to protect its own citizens from the legalized robbery present insurance measures subject the citizens, for by the terms of the bill a Federal license would secure the right to do business within the borders of the State regardless of the State prohibitions, free from the States' protective regulation."

In a calmer vein, this Court itself has recently said in the *Robertson* case:[49]

> ". . . if appellant's contentions were accepted and foreign insurers were to be held free to disregard

[47]Congressional Record, Vol. 40, Part 1, p. 605, remarks of Mr. Johnson. See also Mr. Stevenson's remarks, *id.* p. 597.

[48]Speech on behalf of Protective Committee of Policyholders, reprinted, 322 U.S. p. 594, footnote.

[49]*Robertson v. California*, 328 U.S. 440, at p. 459-60.

> (Louisiana's) . . requirements . . . not only would the state be made helpless to protect her people against the grossest forms of unregulated or loosely regulated foreign insurance, but the result would be inevitably to break down also the system for control of purely local insurance business. In short, the result would be ultimately to force all of the states to accept the lowest standard for conducting the business permitted by one of them or, perhaps, by foreign countries. Inevitably this would mean that Congress would be forced to intervene and displace the states in regulating the business of insurance. Neither the commerce (*sic* Admiralty) clause nor the *South-Eastern* decision dictates such a result."

The McCarran Act, as observed in the *Robertson* case,[50] reinforces and confirms that the regulation of marine insurance companies, and the remedial laws concerning the enforcement of their policies, such as the Louisiana Direct Action statute, is a matter of local concern, not working any material prejudice to the characteristic features of the substantive admiralty law, and hence constitutionally unobjectionable. That both the McCarran Act, and Louisiana's Direct Action Statute, are constitutionally applicable to marine insurance as the type of coordinated action between Congress and the States specifically approved in *Prudential Life Insurance Co. v. Benjamin*, is therefore unquestionable.

III.

CONCLUSION

It is therefore respectfully submitted, on the basis of

[50] *Id.*, at p. 461-2.

the reasons and authorities submitted here, and in our Memorandum in opposition to the petition herein, that the decision of the United States Court of Appeals for the Fifth Circuit herein should be affirmed.

Respectfully submitted,

James J. Morrison

James J. Morrison
Proctor for Respondents
1014 Peré Marquette Building
New Orleans, Louisiana

OF COUNSEL

W. W. Ramsey, Esq.

Arthur A. Delahoussaye, Esq.

Raymond H. Kierr, Esq.

Brown & Rault, Esqs.

CERTIFICATE

I hereby certify that a copy of this reply brief was mailed to Eberhard P. Deutsch, Deutsch, Kerrigan & Stiles, Hibernia Bank Building, New Orleans, Louisiana, on this the 24 day of April, 1953.

James J. Morrison

James J. Morrison

FILE COPY

Office - Supre
F I
JUL 3
HAROLD B.

No. [redacted] 11

Supreme Court of the United States

OCTOBER TERM, 1952

MARYLAND CASUALTY COMPANY, *et al., Petitioners,*

versus

GERTRUDE PICARD CUSHING, *et al., Respondents.*

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

SAMUEL B. BASSETT
STEPHEN V. CAREY

BASSETT, GEISNESS & VANCE
811 New World Life Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 498

Supreme Court of the United States

OCTOBER TERM, 1952

MARYLAND CASUALTY COMPANY, *et al., Petitioners,*

versus

GERTRUDE PICARD CUSHING, *et al., Respondents.*

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

SAMUEL B. BASSETT
STEPHEN V. CAREY

BASSETT, GEISNESS & VANCE
811 New World Life Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

BLEED THROUGH

INDEX

Page

Motion and Supporting Statement 1-7
Certificate 8
Appendix I—Request for Consent to File Amicus Curiae Brief 9-10
Appendix II—Consent given by Respondents 11
Appendix III—Consent refused by Petitioners 12

CASES CITED

Anderson v. Pacific Coast S.S. Co., 225 U.S. 187 5
City of Norwich, 118 U.S. 468 ..... 2, 4
Cooley v. Board of Wardens, 12 Howard 299 2
Cushing v. Maryland Casualty Co.
Majority Opinion, 198 Fed.(2d) 536 4
Dissenting Opinion, 198 Fed.(2d) 1021 4
Hansen v. Continental Insurance Co., 262 N.Y. 136, 186 N.E. 420 5
Merchants Mutual Liability Insurance Co. v. Smart, 267 U.S. 126 5

STATUTES CITED

California Insurance Code
Deering California Codes—Insurance, Vol. 1, Sec. 41 2
Deering California Codes—Insurance, Vol. 2, Sec. 11580 ..... 2, 3, 5
Louisiana Insurance Code, La. R.S. Title 22 ..... 3, 4, 5, 6
New York Insurance Code, Sec. 109, Laws of 1918, Chapt. 182 5
McCarran Act 1945, 15 U.S.C.A. 1011-1012 ..... 4, 6
Federal Limitation of Liability Act, 46 U.S.C.A. 183-185 4

BLEED THROUGH

Supreme Court of the United States

OCTOBER TERM, 1952

MARYLAND CASUALTY COMPANY, *et al.*, *Petitioners,* vs. GERTRUDE PICARD CUSHING, *et al.*, *Respondents.*	No. 498

MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Having been advised that this case has been restored to the docket for re-argument during the October, 1953, term, the undersigned members of the bar of this court respectfully request leave to file an *amicus curiae* brief. We did not learn of the pendency of this case in this court until a few days prior to April 29, 1953, when we were advised by the clerk that it was already under advisement following the original argument on April 27 and 28, 1953.

By letter dated July 1, 1953, counsel for the petitioners and for the respondents were asked to give their consent (Appendix I). Counsel for the respondents consented (Appendix II) Counsel for petitioners declined to give consent (Appendix III).

Our direct interest in the outcome of the case, and our reasons for requesting permission to file our pro-

posed brief, are stated in our letter of July 1, 1953 (Appendix I). Our brief, if allowed to be filed, will present two closely related questions:

(1) There is such a fundamental difference between marine hull insurance and marine liability insurance that cases such as the *City of Norwich,* 118 U. S. 468, concerning hull insurance only have no relevancy whatever in cases involving marine liability insurance only.

(2) The cases starting with *Cooley v. Board of Wardens,* 12 Howard 299, holding that states with the consent of Congress may regulate pilotage and other matters which but indirectly and incidentally affect commerce and navigation justify a state in regulating marine liability insurance which less directly affects such commerce and navigation.

Our case, now in the process of appeal to the Supreme Court of Washington, involves the application of certain provisions of the Insurance Code of California to an action brought by a seaman to recover damages for personal injuries under the maritime law. The applicable provisions of the California Code read:

> "Scope of Code.
>
> "All insurance in this state is governed by the provisions of this Code" (Deering's California Codes—Insurance Vol. 1 Sec. 41).
>
> "Required Provisions of Policy: Construction of Policy
>
> "A policy insuring against losses set forth in subdivision (a) shall not be issued or delivered to any person in this state unless it contains the provisions set forth in subdivision (b). Such policy, whether or not actually containing such provisions,

shall be construed as if such provisions were embodied therein.

"(a) Unless it contains such provisions, the following policy of insurance shall not be thus issued or delivered:

"(1) Against loss or damage resulting from liability for injury suffered by another person other than a policy of Workman's Compensation Insurance.

"(2) Against loss of or damage to property caused by draught animals or any vehicle, and for which the insured is liable.

"(b) Such policy shall not be thus issued or delivered to any person in this State unless it contains all the following provisions:

"(1) A provision that the insolvency or bankruptcy of the insured will not release the insurer from the payment of damages for injuries sustained or loss occasioned during the life of such policy.

"(2) A provision that whenever judgment is secured against the insured in an action brought by the injured person or by his heirs or personal representatives in case death results from the accident, then an action may be brought against the insurer on the policy and subject to its terms and limitations by such judgment creditor to recover on the judgment." Deering's California Codes Insurance, Vol. 2, Sec. 11580.

This California statute and the Louisiana statute immediately involved in the case before the court, are identical in purpose. It seems clear that if the Louisiana statute is condemned as unconstitutional, as petitioners' counsel broadly contend it should be, the California

statute must likewise fall unless the decision of this court is placed on some more restricted ground. We realize that this is not the time or place to make an extended argument. Nevertheless, Rule 27, as we read it, requires that we concisely indicate why we believe our proposed brief will be of assistance to the court:

Concerning the first question stated above:

The majority opinion of the United States Court of Appeals, Fifth Circuit, in this case, 198 F.(2d) 536, found nothing in the Louisiana statute bringing it in conflict with the Federal limitation of liability statute (46 U.S.C. 183-185), as construed by this court in *City of Norwich,* 118 U.S. 468 which case concerned hull insurance only. The dissenting judge rested his dissent largely, if not exclusively, on his conclusion "that no real distinction can be drawn * * * between hull and marine protection and indemnity insurance," 198 F. (2d) 1201. Counsel for petitioners, in support of their main contention that marine liability insurance, even with the express consent of Congress as given by the McCarran Act of 1945, cannot be made subject to state regulation, reiterate that statement of the dissenting judge (see brief for petitioners, Pages 7 and 12-13). Respondents' counsel, while not agreeing that hull insurance and marine liability insurance are undistinguishable when considered in connection with the Federal limitation of liability statute, 46 U.S.C. 183-185, have not, we think, examined that vital question to the extent that it merits. We believe that is can be demonstrated that there is a great and controlling distinction between hull insurance taken out and paid for by the ship owner exclusively for the protection of his own

BLEED THROUGH

investment, and marine liability insurance intended for the protection of the public, including injured seamen. In this connection, see *Merchants Mutual Automobile Liability Insurance Company v. Smart,* 267 U.S. 126, which involved the vaiidity of Section 109 of the New York Insurance Code. That section of the New York Code has been sustained by the Court of Appeals of New York as applied to marine liability insurance, *Hansen v. Continental Insurance Company,* 262 N.Y. 136, 186 Northeastern 420. Section 109 of the New York Code and Section 11580 of the California Code are practically identical. To give effect to the Louisiana Code or the New York Code or the Califoria Code as applied to marine liability insurance, does not run counter to the purposes of the Federal limitation of liability statute. The purpose of that statute is not to defeat claims of creditors further than may be necessary to afford ship owners relief to the extent that the limitation statute itself prescribes. To permit an injured seaman to recover from a compensated marine liability insurer, extinguishes his claim and to that extent, increases the limitation fund available to other creditors. Nothing is drained away from the ship owner.

As to the second and related question, we believe there are some decisions of this court, not cited in the briefs of counsel, which should be considered. Among these is *Anderson v. Pacific Coast SS Co.,* 225 U. S. 187.

Petitioners' counsel, in their brief, first contend that the Louisiana statute, by its very terms, does not apply to marine liability insurance. Respondents' counsel say that as construed by the courts of Louisiana, that

statute does extend to marine insurance. If the court agrees with the petitioners on that question, we assume it will go no further and will decline to consider and decide grave constitutional questions not necessary to a disposition of the case. If the court holds that the Louisiana statute is not operative in the case at bar, solely because of the injunction issued in the limitation of liability proceeding, possibly the other more fundamental questions raised by the petitioners may not require decision. But if the court goes beyond those limited questions, then clearly the constitutional validity of the McCarran Act of 1945, as well as important provisions of the insurance codes of several states, will become involved.

In their letter declining consent to our filing our proposed brief, petitioners' counsel state that their reason for withholding consent is that the primary question in the case at bar arises from the fact that a limitation of liability proceeding in admiralty was pending when the actions at law against the marine liability carrier were commenced. However, in their brief, they broadly contend that in any event, the McCarran Act of 1945 and the Louisiana statute are both unconstitutional if construed as applicable to marine liability insurance, and that contention is insisted upon irrespective of the injunction in the limitation proceeding.

If petitioners' counsel now disclaim any intention of attacking the constitionality of the McCarran Act or the application of the Louisiana statute for any reason except only the pendency of a limitation of liability proceeding in admiralty, that disclaimer should be

BLEED THROUGH

made expressly and unequivocally to the court prior to the reargument. In the absence of such an explicit disclaimer, we believe we should be permitted to be heard, for the decision in this case, depending on the grounds on which it is put, may well be decisive for or against our client.

July 27, 1953.

Respectfully submitted,

.....

SAMUEL B. BASSETT

.....

STEPHEN V. CAREY

BASSETT, GEISNESS & VANCE
811 New World Life Building,
Seattle 4, Washington.

CERTIFICATE

I hereby certify that a copy of the above motion was mailed to James J. Morrison, Esq., 1014 Pere Marquette Building, New Orleans 12, Louisiana, and to Eberhard P. Deutsch, Esq., Hibernia Bank Building, New Orleans 12, Louisiana, this ..... day of July, 1953.

.....

STEPHEN V. CAREY

BLEED THROUGH

APPENDIX I

[Letterhead omitted]

July 1, 1953

JAMES J. MORRISON, Esq.
Pere Marquette Building
New Orleans 12, Louisiana

EBERHARD P. DEUTSCH, Esq.
Hibernia Bank Building
New Orleans 12, Louisiana

Re: Maryland Casualty Company
v. Cushing

Gentlemen:

We have previously had some correspondence with both you gentlmen concerning our interest in this case.

We represent a seaman who several years ago sustained serious injuries in the course of his employment aboard a vessel owned by a Delaware corporation and operated between Seattle and ports in Southeastern Alaska. That operator having discontinued doing business here, we found it necessary to bring suit in the United States District Court for the District of Delaware. That court gave judgment for the plaintiff in the sum of $25,000.00. Because of the insolvency of the judgment debtor, suit was brought on that Delaware judgment in the Superior Court of King County, Washington, against an insurance company which had written a policy of marine liability insurance. That policy was issued and delivered in the State of California. The Insurance Code of California contains a provision (Deering's California Codes Insurance, Vol 2, Section 11580) which, in its main features, is similar to the section of the Louisiana Insurance Code involved in your case.

Our case is now in the process of appeal to the

Supreme Court of Washington. We have examined your briefs and it appears that if the United States Supreme Court sustains the petitioner's contentions as broadly as they are made its decision may, and probably will, adversely affect our client by holding that the California statute on which we rely cannot constitutionally extend to the regulation of marine liability insurance. Hence, we feel justified in asking your consent that we be permitted to file an amicus curiae brief. This request is made in compliance with Rule 27 of the United States Supreme Court. Our brief, if allowed to be filed, will present two closely related questions:

(1) There is such a fundamental difference between marine hull insurance and marine liability insurance that cases such as the *City of Norwich,* 118 U.S. 468, concerning hull insurance only have no relevancy whatever in cases involving marine liability insurance only.

(2) The cases starting with *Cooley v. Board of Wardens,* 12 Howard 299, holding that states with the consent of Congress may regulate pilotage and other matters which but indirectly and incidentally affect commerce and navigation justify a state in regulating marine liability insurance which less directly affects such commerce and navigation.

The judgment which our client obtained in the United States District Court in Delaware, with accumulated interest, now amounts to upwards of $28,000.00. We believe you will agree that we are not attempting to intrude into a case with which we have no real concern.

May we request that you promptly advise us whether or not you are agreeable to our filing our proposed brief.

Very truly yours,

BASSETT, GEISNESS & VANCE
By Samuel B. Bassett

SBB:y

APPENDIX II

[Letterhead omitted]

July 8, 1953

BASSETT, GEISNESS & VANCE, Esqs.
New World Life Building
Second and Cherry
Seattle 4, Washington

Gentlemen:

Re: Maryland Casualty Company, *et als*
vs. Gertrude Picard Cushing, *et al*
No. 498 Supreme Court of the United
States October Term. Our Ref.: 812A

I have your letter of July 1 addressed jointly to me and to Eberhard P. Deutsch, Esq., pursuant to Rule 27 of the Rules of the Supreme Court requesting permission to file a brief amicus curiae with the United States Supreme Court in the above case.

Please be advised that permission, so far as Appellees are concerned for you to file a brief amicus curiae in this matter, is granted.

Very truly yours,

JAMES R. MORRISON.

APPENDIX III

[Letterhead omitted]

July 6, 1953

Gentlemen:

Attention: SAMUEL B. BASSETT, Esq.

Re: Maryland Casualty Company vs. Cushing

Receipt is acknowledged of your letter of July 1, with reference to a brief amicus curiae which you propose to file in the above matter.

From the description which you give, it appears that the case in which you are interested concerns a single claim for personal injury, has no reference to any limitation-of-liability proceeding involving multiple claims for both personal injury and property damage, and is concerned with only one minor aspect of the manifold problems at issue in the Cushing action.

The vital, primary question in the latter case—the constitutional power of a state to affect the intended, nationally uniform, operation of the federal Limited-Liability Act, by local legislative provision for draining away shipowners' insurance protection through litigation outside a pending limitation proceeding, of multiple maritime claims for both personal injury and property damage—is not present in your case at all.

Accordingly, it occurs to us that any brief written from your point of view might tend to divert attention from, rather than to clarify, the real issues in the Cushing case.

We accordingly prefer not to consent to the filing of such a brief, and trust that you will understand our position.

Sincerely,

DEUTSCH, KERRIGAN & STILES.

MESSRS. BASSETT, GEISNESS & VANCE,
New World Life Building,
Seattle 4, Washington.
cc—James J. Morrison, Esq.

SUPREME COURT OF THE UNITED STATES

No. 11.—October Term, 1953.

Maryland Casualty Company, et al., Petitioners, *v.* Gertrude Picard Cushing, et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 12, 1954.]

Mr. Justice Frankfurter announced the judgment of the Court and an opinion in which Mr. Justice Reed, Mr. Justice Jackson and Mr. Justice Burton join.

On the evening of May 19, 1950, the towboat *Jane Smith* in attempting to pass under a bridge over the Atchafalaya River in Louisiana collided with a concrete pier and capsized. The owner and charterer of the *Jane Smith* filed consolidated petitions in admiralty in the United States District Court in Louisiana to limit their liability under the provisions of 46 U. S. C. §§ 183 and 186.[1] The owner and charterer having complied with the procedural requirements of the Limitation Act, the District Court issued an injunction prohibiting suit against them elsewhere than in the limitation proceeding.

[1] 46 U. S. C. § 183: "(a) The liability of the owner of any vessel, whether American or foreign . . . for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

§ 186: "The charterer of any vessel, in case he shall man, victual, and navigate such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel within the meaning of the provisions of this chapter relating to the limitation of the liability of the owners of vessels; . . . ."

Subsequently, in the same District Court, the plaintiffs below, as representatives of five seamen who had been drowned, brought this consolidated action against the owner of the bridge and the liability underwriters of the owner and charterer of the ship.[2] Jurisdiction was based on diversity of citizenship and the Jones Act, 46 U. S. C. § 688. For their right to proceed against the insurance companies, the plaintiffs relied on § 655 of the Louisiana Insurance Code which authorizes direct suit "against the insurer within the terms and limits of the policy."

The two policies sued upon are (1) a workmen's compensation and employer's liability policy, in the amount of $10,000, issued by the Maryland Casualty Co. in which the charterer alone is named as the insured and which contains a special endorsement making its terms applicable to maritime employment; and (2) a "protection and indemnity" policy in the amount of $170,000 issued by the Home Insurance Company of New York, in which both the owner and the charterer are named. Both policies by their terms preclude payment to anyone until the insured shall have been held liable to pay damages.[3]

---

[2] Prior to instituting this action, all five plaintiffs had filed in the limitation proceeding pleadings challenging the shipowner's and charterer's right to limit their liability and asserting claims for damages.

[3] The Protection and Indemnity policy issued by the Home Insurance Company contained the following clauses. "It is agreed that if the Assured, as shipowners, shall have become liable to pay, and shall have in fact paid, any sum or sums in respect of any responsibility, claim, demand, damages and/or expenses, or shall become liable for and shall pay any other loss arising from or occasioned by any of the following matters or things. . . ." There follows the types of injury and loss for which the Company is liable. A subsequent proviso reads "Liability hereunder shall in no event exceed that which would be imposed on the Assured by law in the absence of Contract."

Condition G of the policy issued by Maryland Casualty provides: "No action shall lie against the Company to recover upon any claim or for any loss under Paragraph I (b) foregoing unless brought after

The District Court granted a motion for summary dgment dismissing the consolidated suit against the in-rers on the grounds that the Louisiana statute was, by s own terms, inapplicable to policies of marine insur-ce, and that in any case application of the statute here ould "not only work material prejudice to the char-teristic features of the general maritime law but would so contravene the essential purpose expressed by an t of Congress in a field already covered by that Act. tle 46, § 183 U. S. C. A." 99 F. Supp. 681, 684.

The Court of Appeals, relying solely on diversity juris-ction, reversed, holding that as a matter of local law e District Court had read the Louisiana statute too strictively, a question not open here, and that the stat-e was nothing more than a permissible regulation of surance authorized by the McCarran Act, 15 U. S. C. 1012, and not in "conflict with any feature of substan-ve admiralty law, nor with any remedy peculiar to ad-iralty jurisdiction." 198 F. 2d 536, 539. Deeming this ling important to the proper enforcement of the Limita-on Act, we granted certiorari. 345 U. S. 902.

The only question presented in the petition for certio-ri is whether the application of the Louisiana statute this case would violate "the Jones Act, the Limited iability Act and the constitutional grant to the federal overnment of exclusive jurisdiction in maritime matters." 'e agree with the Court of Appeals that since diversity pports federal jurisdiction, the Jones Act need not be awn upon for jurisdiction. Nor need we be detained y petitioners' contention that as applied to claims

---

e amount of such claim or loss shall have been fixed and rendered rtain either by final judgment against this Employer after trial of e issue or by agreement between the parties with the written consent the Company, nor in any event unless brought within two years ereafter."

against petitioners as underwriters of the charterer who employed the decedents, the State statute here conflicts with the Jones Act in that it would provide an alternative remedy where Congress has prescribed the means of recovery. Since that Act itself makes its remedy available to a seaman "at his election," we perceive no conflict between the Jones Act and the Louisiana direct action statute.

Respondents, on the other hand, seek to derive support for reliance on the Louisiana statute from the McCarran Act which provides "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance. . . ." 15 U. S. C. § 1012. Suffice it to say that even the most cursory reading of the legislative history of this enactment makes it clear that its exclusive purpose was to counteract any adverse effect that this Court's decision in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533, might be found to have on State regulation of insurance. The House Report on the Bill as enacted is decisive:

> "It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which they had been held to possess prior to the decision of the United States Supreme Court in the *Southeastern Underwriters Association case.*" H. R. Rep. No. 143, 79th Cong., 1st Sess. 3.

The question whether application of the direct action statute conflicts with federal maritime law is not touched by the *South-Eastern Underwriters* case. In the face of this unequivocal expression of congressional meaning, the statute cannot be read as doing something that Congress has told us it was not intended to do. The McCarran Act is not relevant here.

This brings us to the governing issue: does the Louisiana statute enter an area of maritime jurisdiction withdrawn from the States? Since Congress has provided a comprehensive legislative system for adjudicating maritime claims, we pass directly to considering whether the operation of the Louisiana statute conflicts with that system, putting to one side the question whether it encroaches upon the general body of nonstatutory maritime law. Cf. *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109; *Just* v. *Chambers*, 312 U. S. 383.

Legislation limiting shipowners' liability was first enacted in 1851 to provide assistance to American shipowners and thereby place them in a favorable position in the competition for world trade. 9 Stat. 635. It provides that in event of a collision or other maritime mishap, occurring "without the privity or knowledge" of the owner (including therein a charterer), liability will be limited to the value of the ship and freight pending.[4] The Act also permits the shipowner by instituting limitation proceedings to have all claims against him brought into concourse in an admiralty tribunal.

The legislation was designed to induce the heavy financial commitments the shipping industry requires by mitigating the threat of a multitude of suits and the hazards of vast, unlimited liability as a result of a mari-

[4] This Court has interpreted this as meaning the value *after* the accident. *Norwich Co.* v. *Wright*, 13 Wall. 104.

After the *Morro Castle* disaster, in which 135 lives were lost and the owners sought to limit their liability to $20,000, Congress changed the statute to provide that if the value of the vessel and freight pending is not enough to cover all claims, that portion of the total recovery applicable to personal injury or death claims shall be at least $60 per ton. 49 Stat. 960; 49 Stat. 1479. 46 U. S. C. § 183 (b)–(e). This provision is applicable, however, only to "seagoing vessels," defined as excluding towboats which is the type of vessel involved here. 46 U. S. C. § 183 (f).

time disaster. This Court has been faithful to this ultimate purpose and has read the statute's words "in a broad and popular sense in order not to defeat the manifest intent." *Flink* v. *Paladini*, 279 U. S. 59, 63. Particularly in view of the fact that Congress subjected the whole limitation scheme to scrutiny in 1935 and 1936 as a result of its application to personal injury and death claims resulting from the sinking of the *Morro Castle*, and did not alter those provisions of the legislation involved here, we must read the statute in the light of its expressed purposes. It is not for us to sit in judgment on the policy of Congress in having all claims disposed of in one proceeding or in apportioning maritime losses.

The direct action statute clashes with the federal system for marshalling all claims arising from certain maritime causes of action. See the detailed provisions in Admiralty Rules 51–54, 334 U. S. 864. The heart of this system is a *concursus* of all claims to ensure the prompt and economical disposition of controversies in which there are often a multitude of claimants. The benefits a *concursus* bestows on the shipping industry were thus described in the hearings on the 1936 amendments to the Limitation Act:

> "Under the limitation statutes, as we have had them since 1851, they had two different purposes to serve; one was to limit the liability of the owner and the other was to draw into one court, in the case of a large accident, all of the claims, in order that they might be heard by one judge on one state of facts, in one trial, and intelligently disposed of. Suppose a big sea comes aboard a passenger liner and 15 or 20 people on that deck are washed up against the stanchions or something else, and the claim is that the ship ought to have slowed down, ought to have known by radio. Those passengers may live anywhere from Maine to Texas, and if you have

20 separate laws in 20 different jurisdictions, you just cannot handle an accident of that kind in any possibly intelligent way. One court will say the line was not negligent; another court will say it was negligent; a third court will say you are entitled to $1,500; the next one may say you are entitled to $45,000; and nobody knows where he is.

"So one of the most useful purposes of the limitation statute was that in a case like that you could file a petition bringing into one court all of the claimants and have one trial. Otherwise you would have to keep the crew off of the ship traveling around the country for 2 or 3 years." Statement by Mr. Charles S. Haight, representing the French Line, Hearings before House Committee on Merchant Marine and Fisheries on H. R. 9969, Part 4, 74th Cong., 2d Sess. 69–70.

And commenting on the limitation of liability sections of the Admiralty Rules of this Court, Mr. Justice Bradley thus described their purpose:

"In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the ship owners from being harassed by litigation in other tribunals . . . . The questions to be settled by the statutory proceedings being, first, whether the ship or its owners are liable . . . and secondly, if liable, whether the owners are entitled to a limitation of liability, must necessarily be decided by the district court having jurisdiction of the case; and, to render its decision conclusive, it must have entire control of the subject

> to the exclusion of other courts and jurisdictions. If another court may investigate the same questions at the same time, it may come to a conclusion contrary to that of the district court; and if it does (as happened in this case), the proceedings in the district court will be thwarted and rendered ineffective to secure the ship owners the benefit of the statute." *Providence & New York S. S. Co.* v. *Hill Co.*, 109 U. S. 578, 594–595.

Direct actions against the liability underwriter of the shipowner or charterer would detract from the benefit of a *concursus* and undermine the operation of the congressional scheme for the "complete and just disposition of a many cornered controversy." *Hartford Accident & Indemnity Co.* v. *So. Pacific Co.*, 273 U. S. 207, 216. The ship's company would be subject to call as witnesses in more than one proceeding, perhaps in diverse forums. Conflicting judgments might result. Ultimate recoveries might vary from the proportions contemplated by the statute. Moreover it is important to bear in mind that the *concursus* is not solely for the benefit of the shipowner. The elaborate notice provisions of the Admiralty Rules are designed to protect injured claimants. They ensure that all claimants, not just a favored few, will come in on an equal footing to obtain a pro rata share of their damages. To permit direct actions to drain away part or all of the insurance proceeds prejudices the rights of those victims who rely, and have every reason to rely, on the limitation proceeding to present their claims.[5]

---

[5] For example, in this case the representatives of a sixth victim may be relying on the limitation action to prove "privity or knowledge" and thus seek a judgment substantially in excess of the ship's value. They will be penalized for relying on the federal legislation and the Rules if the direct actions drain away the insurance proceeds and the shipowner and charterer are unable to meet additional judgments.

Furthermore, insurers, unable to rely on the limitation of liability of their insured and denied the benefits of the *concursus*, would in all likelihood reflect the increased costs in their premiums, thus passing on to the very class sought to be benefited by the federal legislation the short-circuiting effects of the State statute.[6]

In addition to encroachment upon the federal statutory system for bringing all claims into concourse, the direct action statute is in conflict with the congressional policy of limited liability. The complaints in those two of the five consolidated suits which are by agreement part of the record here total $600,000 in alleged damages. Thus we are certainly on notice that the total damages of the respondents may exceed the $180,000 sum which the policies would cover. If the present actions were to result in judgments equaling the face amount of the policies, the insurers would be exonerated of any further obligation to indemnify the owner and charterer under the policies. The shipowner and charterer would then have to face whatever claims may be presented stripped of their insurance protection. How this may come about is easily seen if we assume that the salvaged ship will finally be valued at $25,000—the amount for which we are advised a stipulation has been filed in the limitation proceeding. If the five claimants were to succeed in obtaining judgments of $180,000 without exhausting all claims, there would be no bar to an additional $25,000 recovery from the shipowner and the charterer in the limitation proceeding by other claimants, or perhaps even by some of the respondents here. Yet in the absence of the direct action statute,

[6] That the cost and indeed the availability of insurance depends on limited liability was brought to the attention of Congress in the hearings on the 1936 amendments to the Limitation Act. See Hearings before House Committee on Merchant Marine and Fisheries on H. R. 9969, Part 4, 74th Cong., 2d Sess. 66–67, 129.

the liability policies would be more than sufficient to cover any judgment that might be rendered in the limitation action. Under these circumstances, the extent to which the insured lose the benefits which Congress intended them to have is measured by the protective value of their insurance.[7] Without having bought any policies they could only have been held for $25,000. If they buy the policies, and the Louisiana statute is applied to permit these suits, their liability is still $25,000.

Thus, to permit direct actions under the State statute would require that shipowners become self-insurers for liability risks in order to be sure of getting the full protection of the limitation legislation. In view of the fact that "substantially all maritime risks are insured," *Keen* v. *Overseas Tankship Corp.*, 194 F. 2d 515, 518 (L. Hand, J.), this sort of qualification would be completely inconsistent with the Limitation Act.

In 1886 the Court was called upon to decide whether the proceeds from a hull insurance policy are part of an owner's "interest" in a ship and as such must be turned into the limitation proceeding. In *The City of Norwich*, 118 U. S. 468, the Court held that insurance proceeds need not be turned in. In part, the decision was based on a narrow interpretation of "interest." But Mr. Justice Bradley, who had a commanding role in applying the Limitation Act, reviewed the history and policy of limited liability, and the language of that opinion is an illuminating guide here:

---

[7] This is equally true whatever the vessel is valued at. Of course, we do not know now that the vessel will finally be valued at $25,000. The final valuation may be more or less. Certainly, on the record before us we cannot assume that the ship is valueless, and it may be that shipowner and charterer will need the full $180,000 face value of the policy to indemnify them for a judgment in the limitation action. The very reason that the present suit should not be allowed to proceed is that it is for the limitation proceeding to determine value.

BLEED THROUGH

"Now to construe the law in such a manner as to prevent the merchant from contracting with an insurance company for indemnity against the loss of his investment is contrary to the spirit of commercial jurisprudence. Why should he not be allowed to purchase such an indemnity? Is it against public policy? That cannot be, for public policy would equally condemn all insurance by which a man provides indemnity for himself against the risks of fire, losses at sea, and other casualties. To hold that this cannot be done tends to discourage those who might otherwise be willing to invest their money in the shipping business." 118 U. S., at 504–505.

And the Court, in *The City of Norwich*, foreshadowed the consequences of permitting direct actions against liability insurers of shipowners: "No form of agreement could be framed by which [shipowners] could protect themselves. This is a result entirely foreign to the spirit of our legislation." 118 U. S., at 505.

Of course, wholly apart from the respect to be accorded State legislation, this Court should be slow to find that even where Congress has exercised its legislative power it has not left room for State action. *Kelly* v. *Washington*, 302 U. S. 1. But where, as in this case, the evident design of Congress can only be carried out by barring State action, it must be barred.

It is true that the record before us does not establish with certainty that the present suits would in fact operate to leave the shipowner and charterer to face liability in the limitation action without indemnification. Judgments in the present actions against the insurers might satisfy all claims or leave enough insurance money to indemnify the shipowner and charterer for liability in the limitation action. The salvaged vessel may finally be valued as worthless, exonerating the shipowner and charterer from any liability in the limitation action. Or the

right of the shipowner and charterer to limit their liability might be successfully challenged on the grounds that the mishap did not happen without their "privity or knowledge." [8]

These elements of uncertainty provide a temptation to let the present actions proceed. Further support for this view may reasonably be found in the fact that it is the insurers rather than the shipowner and charterer who are here seeking to rely on the Limitation Act as a defense. But the crucial fact which requires that the conflict between State and federal law be faced now is that the present actions are brought completely independently of the limitation proceeding. If the Court keeps hands off the direct actions, the draining away of the insurance proceeds cannot be challenged at any time by anyone.

This is not a case where some future action remains to be taken by one of the parties to a suit before the critical issue is presented to the Court as clearly as may be. See *United Public Workers* v. *Mitchell*, 330 U. S. 75. Nor is this a case where we can postpone our review until a State court gives meaning to a challenged State statute. *Albertson* v. *Millard*, 345 U. S. 242. In the suits before us, the Court is at the point of no return. Once the respondents have recovered from the insurers the face amount of the insurance policies in the present actions, and they or other claimants are going after the shipowner and charterer in the limitation action, it will be too late to rely on the Limitation Act to preserve the insurance proceeds.

Thus, it is clear that if the present direct actions are permitted, they involve substantial hazard to rights

[8] The allegation of "privity and knowledge" is not an assumption on the basis of which this case could be disposed of. The shipowner's and charterer's right to limitation must be determined, as provided by the Act and Rules of this Court, in the limitation proceeding itself, not in the present suits to which they are not parties.

BLEED THROUGH

granted by an Act of Congress, leaving no way for such impairment to be challenged. Respect for the Act precludes allowance of litigation, based on a State statute, which carries the potentiality of irreparable infringement upon federal law. The point of inadmissible conflict between State and federal legislation is reached as soon as suit is brought against the liability underwriters to get at proceeds of the policies. And if the federal legislation bars such a suit, it would be anomalous to say that the underwriters may not here contest the direct actions.

Of course, liability underwriters are not entitled to "limitation of liability" as that phrase is used as a term of art in admiralty. To state the issue in these terms is to misconceive it. The question is whether the Court is to disregard the effect of a direct action on the federal proceedings. The Louisiana statute, as applied to authorize suits against the insurers of shipowners and charterers who have instituted limitation proceedings, is a disturbing intrusion by a State on the harmony and uniformity of one aspect of maritime law. It is accentuated by the fact that the federal law involved is not a more or less ill-defined area of maritime common law, incursion upon which need not be here considered, but an Act of Congress, well-defined and consciously designed, with detailed rules for its execution established by this Court.

> "If the courts having the execution of [the Limitation Act] administer it in a spirit of fairness, with the view of giving to ship owners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance: but if it is administered with a tight and grudging hand, construing every clause most unfavorably against the ship owner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency

will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions." *Providence & New York S. S. Co.* v. *Hill Co.*, 109 U. S. 578, 588–589.

Accordingly, MR. JUSTICE REED, MR. JUSTICE JACKSON, MR. JUSTICE BURTON and I would reverse the judgment of the Court of Appeals and reinstate that of the District Court dismissing the complaints. For the reasons stated in his opinion, MR. JUSTICE CLARK agrees that the direct action suits should not be permitted to impair the shipowner's and charterer's right to indemnification, but he would allow the District Court to adjudicate the liability of the petitioners to the respondents after the limitation proceeding has run its course.

In order to break the deadlock resulting from the differences of opinion within the Court and to enable a majority to dispose of this litigation, we vacate the judgment of the Court of Appeals and order the case to be remanded to the District Court to be continued until after the completion of the limitation proceeding.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 11.—October Term, 1953.

Maryland Casualty Company, et al., Petitioners, *v.* Gertrude Picard Cushing, et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 12, 1954.]

Mr. Justice Clark, concurring.

I see no necessity for invalidating Louisiana's law by dismissing these direct actions. In administering the Limited Liability Act the Court can easily avoid a clear conflict between it and the direct action statute.

The Limited Liability Act admittedly was not designed for the benefit of insurance companies; nor does it deal with their liability. The purpose of the Congress in passing the Act in 1851 was to encourage investment in American ships by placing a limitation upon the personal liability of the ship owner in the event of an accident where there is no "privity or knowledge." Thereafter this Court in *The City of Norwich*, 118 U. S. 468 (1886), recognized the right of a ship owner to buy insurance coverage for damage to his hull in order to protect against the loss of his investment. The proceeds of such "hull insurance" were held, for purposes of a limitation proceeding, not a part of "the interest" of the owner in the vessel. The basis of the decision was that Congress intended the Act to protect the investment of ship owners, and if the latter were prevented from indemnifying themselves from loss of their investment in the ship it would be contrary to the purpose of Congress as well as to the spirit of commercial jurisprudence. Here, the damage claims which may be sustained in the limitation proceeding will be chargeable against the *Jane Smith* and

the owner may lose the damaged hull or its value unless he can recoup through the insurance which is involved in these direct actions and which he purchased for his protection. If the insurance proceeds are exhausted in the direct actions, the owner's recoupment will be impossible. Though the holding in *The City of Norwich* does not control, I think that the reasoning of that case is pertinent; in other words, the owner of the ship has the same right to protect his investment in the ship by insurance against damage claims arising in its operation and which are chargeable to it [1] as he has to protect his investment from damage to the ship itself. Unless the owner is afforded an opportunity to provide for such protection, the purpose of Congress to encourage investment in American ships will be just as much thwarted as it would have been had the owner's right to buy insurance protection in *The City of Norwich* not been recognized.

To say that this view benefits the shipowner "at the expense of the families of the deceased seamen" is to ignore the realities of the case. Had the owner not purchased liability insurance the claimants could not, under any condition, recover more than the value of the damaged hull if there is no "privity or knowledge." The owner's liability insurance is the sole source of the claimants' hope for a recovery beyond the value of the damaged hull. The owner's motive in purchasing insurance certainly was not to protect his seamen or the public, but to protect himself against damage claims. And in so doing he has aided the widows and orphans of the deceased seamen by creating the possibility of an additional

---

[1] The business practice of purchasing marine protection and indemnity insurance, the type primarily involved here, to protect the shipowner against this contingency has long been recognized. See testimony of Ira A. Campbell for American Steamship Owners' Association, at Hearings before House Committee on Merchant Marine and Fisheries on H. R. 4550, 74th Cong., 1st Sess. 91, 125, 131.

recovery against the insurance companies. Nor can the owner "profit" from the accident. The amount he may recover from the insurers under the liability policies could never exceed the amount he is obligated to pay to the claimants in the limitation proceedings. He "profits" only in the sense that he is permitted to receive the protection for which he paid.

This is not to say that the insurance companies in a direct action are liable to damage claimants. That would be a question of Louisiana law. Our only interest is to make certain that such actions do not interfere with the Federal Limitation proceeding. To do this we need only require that the limitation proceeding be concluded first and the owner's liability settled under it. The petitioners could then discharge this liability, to the extent their policies covered it, by paying into the limitation proceeding the proper sum.[2] The door would then be left open for prosecution of the direct actions against the insurance companies on the remaining coverage of the policies. Thus, whatever the insurers' liability may be under Louisiana law in the subsequent direct actions, the owner's purse cannot be touched.

MR. JUSTICE FRANKFURTER'S opinion states that the cases might be held for the limitation proceeding were it not that Congress intended that proceeding to be, in addition to a concursus of all claims against the owner and charterer, the exclusive forum for litigating all liability resulting from the accident. This is certainly not an unreasonable position. To be sure, some of the arguments for a concursus of claims against the owner or charterer would be applicable to claims against the insurer. But I do not think the arguments for such a hold-

[2] Of course, if the ship is a total loss, and assuming no privity or knowledge, the owners' liability would be nothing under the federal Act. All the insurance would then be available to claimants in the direct actions, if liability is present under Louisiana law.

ing are so persuasive, and the case for an opposite conclusion so feeble, that we should proceed at this juncture to invalidate a state law. It is also reasonable to read the Limited Liability Act as aimed at protecting only owners and charterers. The statute does not speak of suits against insurers. And when the Admiralty Rules were adopted we were concerned solely with the problems of the owner and charterer. For example, the limitation court is empowered to enjoin suits in other courts arising out of the accident only if the suits are against the owner, charterer or vessel; no mention was made of enjoining suits against any other party, *e. g.*, insurance companies. See Rule 51. In sum, we must interpolate the words of the Act regardless of how we hold. When the issue is so close, I would resolve it in favor of upholding rather than invalidating a state statute. We are not here confronted with a picture of law suits in twenty odd states under twenty different state laws; if this be a valid argument against upholding the statute in another situation, it has no application in this case. The towboat *Jane Smith*, owned by a Louisiana resident, plied only Louisiana waters of the Atchafalaya River; the accident which befell the vessel occurred in Louisiana; all the parties save one resided in the state and both the limitation proceeding and the damage suits are pending in the same court before the same judge. Moreover, the damage claimants, perhaps secondary beneficiaries of the Limited Liability Act, are also the beneficiaries of a holding that the Limited Liability Act does not foreclose the possibility of direct actions by them subsequent to the limitation proceeding.

For these reasons, I would direct the District Court to first conclude the limitation proceeding, after which the liability, if any, of the petitioners on their policies in the direct actions could be determined.

UPREME COURT OF THE UNITED STATES

No. 11.—October Term, 1953.

Iaryland Casualty Company, et al., Petitioners, *v.* Gertrude Picard Cushing, et al.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 12, 1954.]

Mr. Justice Black, with whom The Chief Justice, Ir. Justice Douglas and Mr. Justice Minton concur, issenting.

The towboat *Jane Smith* hit a railroad bridge and sank Louisiana waters of the Atchafalaya River. Five crew iembers were drowned. Petitioners, Maryland Casualty ompany and Home Insurance Company, had previously old insurance policies to the boat's owner and its chartrer agreeing to repay them for any money they had to ay on account of injury or death caused by the boat. hese policies were issued and delivered in Louisiana. A ouisiana statute authorizes injured persons or their heirs o sue insurance companies directly on such policies. Uner this law the widows of the drowned crewmen brought iese diversity actions in federal court against petitioners. majority of the Court hold that permitting these suits o go forward to judgments against the insurance comanies prior to completion of limitation of liability proeedings under an 1851 Act of Congress would bring this tate statute into conflict with that Act. But the 1851 ct was passed to help shipowners by limiting the damges they must pay on account of wrongs inflicted by heir agents. I see no possible reason for making insurnce companies the beneficiaries of this shipowners' elief act. Neither can I understand why this Court

should feel called on to relieve shipowners from even the light financial burden that the 1851 Act left them to bear. Nor do I think the Louisiana Act is subject to any of the constitutional objections the insurance companies urge against it. I agree with the Court of Appeals for the Fifth Circuit that the insurance companies' contentions "over-inflate a relatively simple proposition with apparent, but unreal, technical problems." 198 F. 2d 536, 539. For that reason without more I would affirm this judgment. But because of the confused state in which this case goes back to the District Court I think it desirable that all questions be discussed. I shall first take up the constitutional objections.

I.

(a) The insurance companies argue that the Louisiana law impairs the obligation of "maritime contracts." The implication is that maritime contracts have more constitutional protection than other kinds of contracts. But Art. I, § 10 of the United States Constitution, which forbids states to impair the obligations of contracts, draws no such distinction. And while in general this provision protects valid contracts from impairment by subsequent legislation of states, it does not forbid states to pass laws regulating contracts thereafter to be made. *Munday* v. *Wisconsin Trust Co.*, 252 U. S. 499, 503. Cf. *Home Building & Loan Assn.* v. *Blaisdell*, 290 U. S. 398. Hence the Louisiana law, passed before these insurance policies were issued, does not violate the impairment of contract clause and, unless invalid for some other reason, the state's "direct action" statute became a part of the contract when it was made just as though written into each policy by the companies. *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389, 395–400. Cf. *Farmers and Merchants Bank* v. *Federal Reserve Bank*, 262 U. S. 649, 660.

(b) Article III, § 2 of the Constitution provides that "The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . ." It is contended that this provision not only gives the Federal Government supreme power over maritime affairs but that it also denies any power in states to legislate in this field. This complete denial of state power is said to have been established by *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149. The opinions in those cases did lend some support to a constitutional doctrine that the Admiralty Clause requires rigid national uniformity in maritime legislation. But this Court rejected that doctrine in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109. Mr. Justice Brandeis speaking for the Court in that case made it absolutely clear that the Admiralty Clause does not deprive states of power to make different regulations in regard to maritime affairs unless a state attempts to modify or displace essential features of the substantive maritime law or to modify the remedial law of admiralty courts. See also *Standard Dredging Corp.* v. *Murphy*, 319 U. S. 306. These cases but reaffirmed a power that states have always exercised. When the Constitution was adopted the Government found state regulatory systems governing local maritime affairs throughout the country. *Gibbons* v. *Ogden*, 9 Wheat. 1, 207. Congress has never attempted to supplant all local maritime regulations but has left many in effect as useful aids in carrying out national maritime policies. See *Cooley* v. *Board of Wardens*, 12 How. 299; *The Hamilton*, 207 U. S. 398; *Kelly* v. *Washington*, 302 U. S. 1, 14–16. For example, states can even create liens on vessels which may be enforced either in state courts or in courts of admiralty, despite the lack of uniformity brought about by "intricate and conflicting State laws creating such liens . . . ." *The Lottawanna*, 21 Wall. 558, 581. In declining to in-

validate these state lien laws this Court there pointed out that Congress could terminate the effectiveness of such state legislation at any time it desired to assume control.

The uniformity which the Admiralty Clause of the Constitution requires is limited to one indefinitely defined area—that involving "the essential features of an exclusive federal jurisdiction." *Just* v. *Chambers*, 312 U. S. 383, 391. Except in instances falling clearly within this area states are free to make laws relating to maritime affairs. Thus, in *Just* v. *Chambers*, Florida was permitted to provide a remedy for death due to maritime torts in Florida waters, even though such a remedy was not permissible under maritime law and not available in other states. Here Louisiana has provided a remedy for death due to maritime torts in Louisiana waters and it is therefore difficult for me to see how the present case can be distinguished from *Just* v. *Chambers*. Neither Congress nor this Court has provided or forbidden suits against insurance companies in cases like these, or attempted to establish uniform rules for the regulation of maritime insurance to the exclusion of the states. Indeed, it was not until 1870 that this Court finally decided that the regulation of marine insurance was within the jurisdiction of admiralty at all. *Insurance Co.* v. *Dunham*, 11 Wall. 1. Prior to that time, there was strong support for the belief that the states alone could regulate marine insurance. No act of Congress and nothing this Court has said since the *Dunham* decision in 1871 has taken away the concurrent jurisdiction of states over maritime insurance policies.[1] No reason has been advanced why marine in-

[1] In the Merchant Marine Act of 1920 Congress recognized that "marine insurance companies" were operating under state laws. Section 29 of the Act defines that term to include companies "authorized to write marine insurance or reinsurance under the laws of the United States or of a State . . . ." 41 Stat. 988, 1000, 46 U. S. C. § 885 (a) (2).

surance, long the province of the states, so imperatively requires uniformity that we should now hold that Congress alone can regulate it.[2] Consequently, to enforce the Louisiana law would not impair the uniformity of maritime law, but would once again "illustrate the alacrity with which admiralty courts adopt statutes granting the right to relief where otherwise it could not be administered by a maritime court . . . ." *Workman* v. *New York City*, 179 U. S. 552, 563. See also *The Hamilton*, 207 U. S. 398.

Louisiana's statute, as sought to be applied here, would further the equitable aims of admiralty by providing relief not otherwise available for maritime wrongs. For behind this "direct action" statute lies a long history of state attempts to protect the public interest by ensuring that liability policies furnish adequate protection to persons injured. At one time insurance companies were commonly able to avoid payment of a single dollar on their policies whenever the insured was insolvent and therefore judgment-proof. The insurance, although bought and paid for, would remain untouched while valid claims went entirely unsatisfied. To prevent this injustice many states passed laws of one kind or another which required insurance companies to pay injured persons even though the insured had paid out no money. The Massachusetts Supreme Judicial Court took the lead in sustaining a law of this type, Chief Justice Rugg suggesting its need to prevent liability insurance from becoming a "snare to the insured and a barren hope to the injured." *Lorando* v.

---

[2] In 1935 when Congress was considering amendments to the Limited Liability Act, counsel for the American Steamship Owners' Association strongly contended for continued regulation of marine insurance by the states and against a federal regulation system that would have been uniform in all the states. Hearings before House Committee on Merchant Marine and Fisheries on H. R. 4550, 74th Cong., 1st Sess. 91, 124.

Gethro, 228 Mass. 181, 189, 117 N. E. 185, 189. And, despite the fact that these state statutes wrote compulsory terms and obligations into all insurance contracts, this Court sustained such a statute applying to automobile insurance. Chief Justice Taft said that ". . . it would seem to be a reasonable provision by the State in the interest of the public, whose lives and limbs are exposed, to require that the owner in the contract indemnifying him against any recovery from him should stipulate with the insurance company that the indemnity by which he saves himself should certainly inure to the benefit of the person who thereafter is injured." *Merchants Mutual Automobile Liability Ins. Co.* v. *Smart*, 267 U. S. 126, 129–130. The Louisiana statute is an application of this same principle. It expresses the public policy of Louisiana that liability insurance exists for the protection and benefit of the injured as well as the insured. *Davies* v. *Consolidated Underwriters*, 199 La. 459, 475–476, 6 So. 2d 351, 357. Under Louisiana's law an individual purchases liability insurance not for himself alone but also for those whom he may injure. This bargain is advantageous to the purchaser because claims against him can be satisfied in suits against the insurer.

There can be no constitutional barrier to this Louisiana law passed to protect persons injured within its borders. Consequently, unless Congress has specifically forbidden states to protect seamen this way, Louisiana's statute is valid and should be enforced.

II.

The majority hold that the Limited Liability Act of 1851, as amended, bestows on the shipowner a right to collect all or part of the insurance money for his profit despite Louisiana's statute requiring insurance companies to make their payments directly to the families of persons injured or killed. I think this construc-

tion gives ship owners far more than Congress intended. The Limited Liability Act provides that "The liability of the *owner of any vessel* . . . for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." [3] (Emphasis supplied.) This Act relieves shipowners from a large part of the liability normally imposed on employers for torts of their employees. Under the Act, a shipowner need pay nothing to tort claimants if the ship is a total loss. If it is not wholly destroyed, the shipowner can simply turn a fund equal to the value of his interest in the damaged ship over to a court in a limitation proceeding. All claims against the shipowner must then be satisfied out of that fund, no matter how large the claims or how small the fund. The purpose of Congress in limiting the liability of shipowners was to encourage investment in American ships. But neither the Act nor its history indicates a purpose to encourage investment in insurance companies by limiting their liabilities. The insurance companies contend, however, that requiring them to pay their policy obligations to these claimants will somehow compel shipowners to pay out money in excess of the liability provided by the Act. For the reasons that follow I think this contention is without merit.

(a) The majority appear to hold that if the insurance companies pay out the full amount of their policies in these actions and some recovery is also had against the shipowner in limitation proceedings the shipowner will be unable to get reimbursement for that recovery from the insurers and to that extent will be "deprived of his insurance." It was conceded at the bar, however, that the

[3] R. S. § 4283, as amended, 49 Stat. 960, 49 Stat. 1479, 46 U. S. C. § 183 (a).

ship here is without value—a total loss. If this is true, there would be no fund in the limitation proceedings and no possibility of any recovery at all against the shipowner. Under these circumstances, the shipowner does not stand to lose a dime if the insurance companies are held liable for the full amount of their policies, and there is no reason for deferring trial of these lawsuits.

(b) Even if the ship has some value and there should be recoveries from the limitation fund, Louisiana's statute would not deprive the shipowner of any right given by the Limited Liability Act. That Act was passed to help shipowners by permitting them to escape full liability for wrongs of their agents. But not a word in it suggests that Congress also intended to give shipowners additional special privileges with respect to liability insurance or to interfere with state regulation of any type of insurance. Nor was any such expanded construction of the Act made by this Court in *The City of Norwich*, 118 U. S. 468. That case rested entirely on a holding that money from hull insurance was no part of an owner's "interest" in his ship which the Limited Liability Act required him to turn over to damage claimants. The Court was concerned only with what made up the limitation fund. The claimants here make no contention that liability insurance is part of the limitation fund. They concede that the shipowner can be made to pay out only the value of his "interest" in the damaged ship. But they insist that the shipowner should not be allowed to escape loss from even the limited liability which Congress put on him, if the result is to deprive injured persons of insurance bought to protect them. There is a vital difference between liability insurance and hull insurance with which *The City of Norwich* dealt. The latter provides recovery for loss of the shipowner's property. But liability insurance is not bought to guarantee reimbursement for loss of a shipowner's property. Its purpose is to pay for damage done

to others by the shipowner or his agents. The shipowner has an insurable "interest" in his ship; if it is lost or damaged any insurance money collected is his own. I cannot believe he has an insurable "interest" in his seamen which could possibly entitle him to reduce the already limited financial obligations the Act imposes by taking for himself insurance money which otherwise would go to compensate seamen or their families for injuries he inflicts. The result of holding that the Act gives the shipowner this insurance benefit is, at least in some circumstances, to leave him with more money after a wreck if he injures people than if he does not. It is a far cry from the decision in *The City of Norwich* that a shipowner is entitled to keep the insurance collected for loss of his own ship to today's holding that states cannot assure seamen that they instead of the shipowner can get the full benefit of liability policies bought in order to pay their just claims for injuries caused by the ship.

(c) It is said, however, that other shipowners might have to pay higher premiums and also buy more insurance if recoveries are allowed here, and that this would discourage investment in ships. How the Limited Liability Act may be read to impose a ceiling on premiums, over which the states normally have full power, is difficult for me to understand. I have searched the Act's history in vain for any support for this interpretation. Yet 103 years after the Act's passage it is discovered that Congress intended to help shipowners by preventing states from making regulations that might raise the cost of marine insurance. But Congress decided to help shipowners by reducing their obligations due to wrecks, not by reducing the prices they had to pay for carrying on their business either before or after a wreck. Construing the Act to protect shipowners from having to pay higher prices for oil or coal would be no less far-fetched than construing it to keep down insurance premiums. This Court often

protests its desire to indulge every presumption in favor of the validity of state legislation. It is hard to reconcile this commendable judicial philosophy with use of attenuated inferences about increased premiums as an excuse for impairing this Louisiana law.

(d) Despite the insistence of petitioner insurance companies that these suits must be wholly barred to save shipowners from injury, it seems plain that the only real beneficiaries of such a holding would be the companies themselves. They, rather than the shipowner, would enjoy the protection sought to be written into the Limited Liability Act. But even the most generous reading of the Act gives no ground for believing that it was intended to help insurance companies, directly or indirectly. And nothing in the records of the congressional debates or reports supports such a strained interpretation. Shipowners, not insurance companies, were the group Congress wanted to help.

(e) For the above reasons I think the Limited Liability Act does not require deferring the present suits so that the shipowner can be the direct beneficiary of these insurance policies at the expense of the families of the deceased seamen. But quite apart from these reasons, the same conclusion is required by specific instructions from Congress. The McCarran Act provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance . . . ." 15 U. S. C. § 1012 (b). It is unquestionably true that the McCarran Act was passed in response to this Court's decision that insurance was subject to the federal commerce power.[4] But that is no reason for giving the law an unnaturally narrow construction squarely in the teeth

[4] *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533.

of the plain, normal, everyday meaning of the language used. The Act rather shows the strong purpose of Congress to permit states to continue regulating insurance as they always had. Courts are pointedly told to leave states free to regulate "the business of insurance" in the absence of some congressional act that "specifically relates" to the same subject. The "business of insurance" includes marine insurance and by no stretch of imagination can it be said that the 1851 Act "specifically relates" to insurance. Thus the unambiguous language of the McCarran Act forbids courts to construe federal statutes such as the Limited Liability Act so as to impair a state law like Louisiana's. No legislative history can justify judicial emasculation of this language. I would not disregard its mandate.

III.

Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons.[5] If shipowners really need an additional subsidy, Congress can give it to them without making injured seamen bear the cost. It is significant that no shipowner has argued here against direct recoveries from the insurance companies.

Today's decision creates unnecessary delay and doubt as to recovery by the families of the *Jane Smith's* victims. The loss of their breadwinners is not to be shared by the shipping industry the seamen served. It was such results that led to efforts to spread the cost of industrial

[5] See Springer, Amendments to the Federal Law Limiting the Liability of Shipowners, 11 St. John's L. Rev. 14; Note, 35 Col. L. Rev 246.

accidents and disasters through insurance and workmen's compensation laws. Acting consistently with this broad trend in the law, Louisiana has tried to make certain that all liability insurance will get to those for whose protection it was purchased. And application of Louisiana's statute under the circumstances here is also in harmony with the humane policy of the maritime law. Seamen have traditionally been the wards of admiralty, and admiralty has been increasingly solicitous to provide compensation for accidents occurring in their dangerous work. Thus both the general trend of the law and the specific bent of admiralty support the policy of the people of Louisiana which permits recovery here. No language in the Limited Liability Act forbids it; the language of the McCarran Act should compel it.